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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 191

GERALDINE SNELL, MIRIAM RAMOS and JUAN MALAVE, Individually and on Behalf of Their Minor Children, and on Behalf of All Other Parents of Needy, Dependent Children, and ROBERT WHALEY, and HELEN MARLEY, Individually and on Behalf of All Others Similarly Situated,

Appellants,

—v.—

GEORGE K. WYMAN, as Commissioner, New York State Department of Social Services; MITCHELL GINSBERG, as Commissioner, New York City Department of Social Services,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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Appellants,

—v.—

GEORGE K. WYMAN, as Commissioner, New York State Department of Social Services; MITCHELL GINSBERG, as Commissioner, New York City Department of Social Services,

Appellees.

JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the United States District Court for the Southern District of New York. The three-judge court (C. J. Kaufman dissenting) dismissed appellants' suit for a declaratory judgment and injunctive relief restraining enforcement of certain statutes and regulations which impose repayment obligations upon recipients of cash assistance in New York State.

Appellants submit this Statement to show that the Supreme Court has jurisdiction of the appeal and that the

appeal presents a substantial question for determination by this Court.

Opinion Below

The opinion of the District Court is unreported. It is set out in the Appendix to this Jurisdictional Statement at pp. 14 to 43.

Jurisdiction

This appeal is taken pursuant to Title 28 of the United States Code, Section 1253.

Appellants filed their original complaint in this cause under Title 28 U. S. C. Sections 1331(a), 1343(3) and (4), 2201 and 2202 and Title 42 U. S. C. Section 1983 in the Southern District on July 13, 1967. On August 2, 1967, Judge Marvin E. Frankel granted appellants' motion for the convening of a three-judge court. On February 29, 1968, the Court issued its opinion dismissing the complaint. Judgment thereon was entered March 15, 1968 (A13).*

Appellants filed their notice of appeal to this court in the Southern District of New York on April 11, 1968. The jurisdiction of the Supreme Court to review by direct appeal pursuant to 28 U. S. C. Section 1253 a decision of a three-judge district court has been sustained by the following decisions:

United States v. *Georgia Public Service Commission*, 371 U. S. 285, 287 (1962);
American Federation of Labor v. *Watson*, 327 U. S. 582, 591 (1945).

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* Page references to the Appendix to the Jurisdictional Statement are prefixed by the letter A. R. refers to the Record on Appeal.

Statutes and Regulations Involved

Sections 104, 104a, 105, and 360, Social Services Law, Cons. Laws of New York Ann. are the statutes and Title 18, Sections 368.2 and 369.2 Regulations of New York State Department of Social Services, promulgated pursuant to said statutes, are the regulations involved in this appeal. The statutes and regulations (hereinafter sometimes collectively referred to as the "*recovery provisions*") are set out in the Appendix at pp. 54 to 63 *et seq.*

Questions Presented

1. Whether the New York State recovery provisions as construed and applied are invalid under the Supremacy Clause of Article VI of the United States Constitution because they conflict with the purposes and intent of the Social Security Act, Title 42 U. S. C. Sections 601 and 1351, the Aid to Families of Dependent Children ("AFDC") and Aid to the Permanently and Totally Disabled ("APTD") program, respectively; and

2. Whether the New York State recovery provisions as construed and applied arbitrarily, unreasonably and discriminatorily deprive welfare recipients of liberty and property and deny them the due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

Statement of the Case

The material facts involved in this appeal are not in dispute. 32 states have regulations and statutes similar to those being attacked here (A26).

The New York recovery provisions create an "implied contract" (Section 104) to repay the cost of cash grants, but not medical assistance, together with the costs of distribution under all of the state's relief programs, including AFDC and APTD, and further impose upon recipients the obligation to reimburse the state out of specified kinds of assets, whether or not immediately available to the client. These include: damages for personal injuries (Section 104A), life insurance benefits (Section 105) and realty (Section 360) (R. 273-274). Except in fraud situations recovery is not sought from employment earnings (R. 635).

An applicant for cash assistance must be entirely without assets or if otherwise eligible because of need must assign to the local Welfare Department all assets, even those of minimal value, as a prerequisite to receipt of assistance (R. 481). In most cases, destitution is an ongoing condition for continued receipt of assistance and reliefers who maintain bank accounts subject themselves to fraud penalties. The Department will seek repayment in such situations even from estates otherwise payable to surviving, minor children (R. 482-3).

Welfare Department attorneys pursue monies in civil actions based on assignments as well as the "implied contract" theory. Though all recipients are made aware of the repayment obligation (R. 512-513), for 1966 total state recoveries amounted to less than one half of one percent of expenditures for assistance (R. 224) and over one half of

recovery situations were attributable to the Old Age Assistance program.

Though the state permits exemptions equalling a one-year budget allowance ordinarily and the equivalent of a two-year allowance in personal injury cases, the recovery provisions as construed and applied admittedly do not take cognizance of the fact that, after repayment, the recipient or former recipient may return to the rolls (R. 500). Recovery is sought, not only from those *able* to pay, but from all those with property *available* for repayment (R. 674). Though the federal statute permits (42 U. S. C. 602(a)(7)(B)) New York will not allow an AFDC mother, with assets, to avoid the recovery provisions by placing them in a trust fund for the education of her children (R. 597-599).

Appellants are current or former welfare recipients under the AFDC, APTD, or in the case of appellant Marley, under the non-categorical, locally financed Home Relief program. All are low-income persons with little or no savings (R. 629-632).

Geraldine Snell is divorced, has four children, works part-time, and expects to complete college in 1969. Pursuant to Sections 104 and 360, the state required appellant Snell as a pre-condition to receipt of assistance, to assign an equitable interest (R. 275-277, 279-280) worth about $900, in a cooperative apartment.

Miriam Ramos, Juan Malave and Robert Whaley were compelled, pursuant to Sections 104 and 104A to execute assignments of personal injury claims. Appellant Ramos is the mother of three children, all under four years of age. Her husband is in jail. Appellant Malave is the employed

father of eight children. He received AFDC for a brief period in 1967 when unable to work because of an accident. Appellant Whaley became a recipient after losing his leg in a mishap. Prior thereto he earned a living as a free-lance photographer and hopes to resume that career (R. 277-381).

Appellant Marley, a sixty-eight year old chambermaid, received assistance while ill with cancer from 1945 to 1954 and during that time assigned, pursuant to Section 104 and to the predecessor statute to Section 105, the benefits of a life insurance policy on her life. The state refuses to release to her benefits in the amount of $485 from the policy which has been paid-up since 1966 (R. 295-298).

Appellants adduced uncontroverted testimony from social work experts Dr. Charles Grosser and Barbara Lounds that the recovery provisions effectively negate rehabilitative objectives of the Social Security Act generally by depressing ambition and compounding the sense of dependency (R. 532-545, 689-709). Dr. Grosser testified that though the Act is generally consistent with social work goals and since its inception members of his profession have been involved in its administration "any social work purpose in the recovery provisions is quite beyond my comprehension" (R. 533).

Former Welfare Commissioner Mitchell Ginsberg testified, that the recovery provisions are grounded primarily in economy considerations and not in social work considerations. They relate, he said solely to "money," for reimbursing the public for the cost of assistance rendered (R. 500-501).

Judge Frankel, writing for the District Court majority, found that the recovery provisions "do not approach the

showing of irrationality or arbitrariness warranting exercise of the limited veto power of the federal judiciary under the Fourteenth Amendment" (R. 639); nor, said Judge Frankel, do the provisions conflict with federal statutory policy so as to violate the Supremacy Clause (R. 652-655).

Judge Kaufman, dissenting, would have found that the provisions in failing to meet the test of "minimal rationality" deprived recipients of liberty guaranteed by the Fourteenth Amendment (R. 667). Said Judge Kaufman, "by reason of the seriousness of the personal interest involved, the inelegance of the scheme designed, the ease of correcting it by more discriminating methods, and the insubstantiality of the interest served, the State of New York has not acted with adequate precision." (R. 666.)

The Questions Are Substantial

The questions presented on this appeal are plainly substantial under governing decision of this Court.

1. *The Recovery Provisions Violate the Supremacy Clause*

Congress intended in enacting the public assistance titles of the Social Security Act that AFDC monies be used to "help maintain and strengthen family life" and to assist adult recipients to "attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection" (42 U. S. C. 601).

APTD benefits are for the purpose of helping disabled recipients "attain or retain capability for self-support or self-care" (42 U. S. C. 1351).

The record shows that the recovery provisions bear no relation to the humane purposes of the Act or to benefits levels (R. 447) and, in fact, are designed to reduce the state's welfare costs. This is a consideration that cannot justify state action which deprives citizens of constitutional rights, *Edwards* v. *California,* 314 U. S. 160 (1941). Whereas in *Edwards* in attempting to prevent paupers from entering the state California interfered with a citizen's right to travel, the recovery provisions deprive welfare recipients of a more basic right to become independent and self-supporting with the aid of cash assistance.

But, most important, the uncontroverted evidence in the record also shows that the provisions frustrate the rehabilitative objectives *inter alia* by deterring needy eligibles from applying (R. 337, 340), by requiring destitution as a condition of assistance, by depressing the ambitions of those on rolls, by discouraging low-income males from entering into marriage with AFDC mothers, and by facilitating the return to the relief rolls of former recipients who acquire assets (R. 631-632).

Unlike the welfare residency requirements presented to this court in *Shapiro* v. *Thompson,* 270 F. Supp. 331 (D. Conn. 1967), the recovery provisions are not explicitly authorized by any portion of the Social Security Act (cf. 42 U. S. C. Sections 603 and 1353). Instead, the available legislative history strongly indicates that Congress intended to restrict recoveries to fraud situations. Report No. 65, House Ways and Means Committee (p. 17); Report No. 628 of the Senate Finance Committee, 74th Cong. First. Sess. (1935). *City of Worcester* v. *Quinn,* 304 Mass. 276 (1939).

The Social Security Act must also be read in the light of the common law rule in most of the states, including New York, and in England that welfare payments normally could not be recovered. *Charlestown* v. *Hubbard*, 9 N. H. 195 (1938); *City of Albany* v. *McNamara*, 117 N. Y. 168 (1889); *Guardians of Pontypridd Union* v. *Drew*, 1 K. B. 214 (1927).

Accordingly, the recovery provisions conflict with the Social Security Act and palpably infringe its policy, *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 766 (1945). The repugnance is so direct and positive that the two bodies of law cannot be reconciled or consistently stand together, *Kelly* v. *Washington*, 302 U. S. 1, 10 (1937); thus, regardless of possible other constitutional defects, the provisions violate the Supremacy Clause. *Bibb* v. *Navajo Freight Lines*, 359 U. S. 520, 529 (1959).

2. *The Recovery Provisions Deny Recipients the Equal Protection of the Laws*

The test that the court has employed under the Equal Protection Clause is "whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination." *Loving* v. *Virginia*, 388 U. S. 1, 10 (1967); *Levy* v. *Louisiana*, 36 U. S. L. W. 4458 (May 20, 1968). See also *McLaughlin* v. *Florida*, 379 U. S. 184 (1964); *Morey* v. *Doud*, 354 U. S. 457 (1957).

State courts have applied this equal protection principle in welfare situations. See *Collins* v. *State Board of Social Welfare*, 248 Iowa 369 (1957); *Department of Mental Hygiene* v. *Kirchner*, 36 Cal. Rptr. 488 (1957). The recovery provisions do not pass this test. They single out cash assistance recipients for repayment for no reason, while

affluent citizens receive various kinds of public benefits, gratis, e.g., oil depletion allowances, transportation and farm subsidies.

The recovery provisions also pick and choose arbitrarily and without a glimmer of reasonable justification among classes of poor persons to discriminate against those most in need and least likely ever to be able to repay. Pursuant to federal statutory direction recipients of medical assistance to the indigent ("Medicaid in New York"), who, on the basis of higher financial eligibility qualifications, are in a better position to repay than cash assistance recipients, except in special circumstances are under no repayment obligation. Title XIX, Social Security Act, 42 U. S. C. A. Section 1396(a)(a)(18); Section 366, Social Services Law, Cons. Laws New York Ann. This discrimination has been severely criticized by at least one responsible public body. ("Having the Power, We Have the Duty"; Report of the Advisory Council on Public Welfare, June 1966, at p. 114.)

Finally, the recovery provisions arbitrarily exempt welfare recipients with claims under Section 33, Workmen's Compensation Law and Section 2, Volunteer Firemen's Benefits Law, Cons. Laws New York Ann., and discriminate against infants on welfare who are awarded damages for personal injuries. In addition to "windfalls," recoveries also are made from that portion of personal injury monies intended to compensate for the recipients' pain and suffering despite the fact that as in the case of appellant Whaley, such payments will never fully reimburse him for the loss of his leg.

3. *The Recovery Provisions Violate the Due Process Clause*

The State of New York arbitrarily and unreasonably deprives cash assistance recipients of property in the traditional sense, namely, realty, monetary windfalls, life insurance benefits and personal injury claims. It is true that this Court during the past three decades has been reluctant to overturn state legislation in "economic due process" cases. See *Williamson* v. *Lee Optical of Oklahoma,* 348 U. S. 483, 488 (1955); but cf. *Morey* v. *Doud, op. cit. supra,* at 468, 471, 475.

However, as conceded by the majority opinion below (R. 642) the principal consideration that guided this Court in those cases was a reluctance to interfere with state regulation of business activities. Contrary to the majority opinion, appellants contend that the principle is not applicable here where admittedly, "the primitive needs of desperate people are at stake." (R. 642.)

The recovery provisions also deprive recipients who are deterred from applying or denied benefits because they possess assets of modest valuation, of property rights in the cash benefits themselves. This form of property assumes the greatest importance and should be entitled to the utmost protection since, in our highly mechanized society, its recipients absolutely depend on such benefits for their survival. See SMITH, THE RIGHT TO LIFE (1955); Reich, *The New Property,* 73 Yale L. J. 733, 785 (1964); Smith, *Public Assistance as a Social Obligation,* 63 Harv. L. Rev. 266 (Dec. 1949).

Finally, and perhaps most important, the recovery provisions deprive recipients of the liberty or freedom, within the meaning of the Due Process Clause, to become inde-

pendent and self-supporting. The provisions *inter alia* deter needy applicants from applying, prevent welfare mothers from remarrying, deprive children of father figures. The assets assigned in this case could be put to better use, compatible with the statutory purposes of cash assistance, by setting up appellant Whaley in his own business, by providing appellant Marley with a reasonable monetary reserve for burial purposes, and by contributing to the education expenses of the children of appellants Ramos, Malave and Snell. See dissent by Judge Kaufman, *Appendix infra* at p. 44; *Griswold* v. *Connecticut*, 381 U. S. 479, 498 (1965); *Bolling* v. *Sharpe*, 347 U. S. 497 (1954); *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923); *Wall* v. *King*, 206 F. 2d 878, 882 (1st Cir., 1953); Reich, *The New Property*, *op. cit. supra*, at 742.

CONCLUSION

For the reasons stated above, a substantial question under the Constitution is presented in this case, and jurisdiction should be noted.

Respectfully submitted,

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June, 1968

APPENDIX A

Judgment of the United States District Court, Southern District of New York

The defendants having brought on a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment and said motion having come on to be heard before the Honorable Marvin E. Frankel, the Honorable Irving R. Kaufman, and the Honorable Charles M. Metzner, and the Court thereafter on February 29, 1968 having handed down its decision granting said motion, it is

ORDERED, ADJUDGED, AND DECREED that the defendant, George K. Wyman, as Commissioner, New York State Department of Social Services has judgment against the plaintiffs, Geraldine Spell, Miriam Ramos, Juan Malave, Helen Markey and Robert Whaley dismissing the action.

Dated: New York, New York,
March 14, 1968.

IRVING R. KAUFMAN,
Circuit Judge.

MARVIN E. FRANKEL,
District Judge.

CHARLES M. METZNER,
District Judge.

APPENDICES

APPENDIX A

Judgment of the United States District Court, Southern District of New York

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ORDERED, ADJUDGED, AND DECREED that the defendant, George K. Wyman, as Commissioner, New York State Department of Social Services has judgment against the plaintiffs, Geraldine Snell, Miriam Ramos, Juan Malave, Helen Marley and Robert Whaley dismissing the action.

Dated: New York, New York,
March 14, 1968.

IRVING R. KAUFMAN,
Circuit Judge.

MARVIN E. FRANKEL,
District Judge.

CHARLES M. METZNER,
District Judge.

APPENDIX B

Majority Opinion of the District Court

FRANKEL, *D.J.*:

The welfare laws and administrative regulations of New York State contain provisions, more particularly described below, which impose upon welfare recipients an obligation to repay the cost of assistance benefits out of specified kinds of assets. The plaintiffs, who have received and are receiving various forms of welfare payments, brought this suit for declaratory and injunctive relief, urging that such provisions are invalid and unenforceable on one or more of several federal constitutional grounds. Predicating federal jurisdiction upon 42 U. S. C. §1983 and 28 U. S. C. §§1331(a), 1343(3) and (4), 2201 and 2202, plaintiffs moved for the convening of a three-judge court under 28 U. S. C. §2281. The motion was granted. Thereafter, plaintiffs took some depositions, and the parties entered into two stipulations. The result of these steps is a record which, in the view of the court as well as the litigants, adequately poses the constitutional issues upon undisputed facts. Both sides have moved for summary judgment. For the reasons hereafter stated, the court will grant defendants' motion and dismiss the complaint.

I.

The problems of the plaintiffs which brought them to the welfare authorities and then to this court—problems which cannot fail to evoke profound sympathy from fellow humans, whether or not they warrant revision of New York law by federal judges—may be summarized as follows:

Plaintiff Geraldine Snell is thirty-three years old, divorced, mother of four children ranging from four to seventeen years of age. She owns an equitable interest, worth about $900 as of September 1, 1967, in a three-room cooperative apartment where she and her children reside. She has a regular, part-time clerical job at which she earns net wages of some $32 per week. Pursuant to court order, she receives $25 weekly from her first husband toward the support of the children. Her second husband, from whom she was divorced in 1966, contributes nothing for her support or the children's. Since September 1965 (financed by state and private scholarship funds), she has been enrolled in a course of full-time college study, scheduled for completion in June of 1969, after which she hopes to pursue a teaching career.

In February of 1967, Mrs. Snell applied and was found eligible for benefits under the state program of Aid to Families with Dependent Children (AFDC).[1] She receives currently what is described in the papers as "a complete, regular budget allowance."

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[1] The program is one encouraged and financed in substantial part by grants-in-aid from the federal government authorized by 42 U. S. C. §601-09 (1964), as amended (Supp. 1967), "[f]or the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives * * * to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support * * *." 42 U. S. C. §601. To receive federal funds under the AFDC categorical assistance program, New York State was required to submit a "state plan" for approval by the Secretary of Health, Education and Welfare, 42 U. S. C. §§601-2. It appears that the State of New York has complied with this requirement, and there is no indication that the Secretary has disapproved the state plan in any relevant respect. AFDC grants are dispensed according to minimum standards of eligibility and administration set by the Social Security Act and by state statutes that determine the level of need and otherwise define the classes of eligible families. See N. Y. Social Services Law §343 *et seq.*

Purporting to act under sections 104[2] and 360[3] of the New York Social Services Law and accompanying regula-

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[2] "§104. *Recovery from a person discovered to have property*

"1. A public welfare official may bring action or proceeding against a person discovered to have real or personal property, or against the estate or the executors, administrators and successors in interest of a person who dies leaving real or personal property, if such person, or any one for whose support he is or was liable, received assistance and care during the preceding ten years, and shall be entitled to recover up to the value of such property the cost of such assistance or care. Any public assistance or care received by such person shall constitute an implied contract. No claim of a public welfare official against the estate or the executors, administrators and successors in interest of a person who dies leaving real or personal property, shall be barred or defeated, in whole or in part, by any lack of sufficiency of ability on the part of such person during the period assistance and care were received.

"Nor shall the claim asserted by a public welfare official against any person under this section be impaired, impeded, barred or defeated, in whole or in part, on the grounds that another person or persons may also have been liable to contribute.

"In all claims of the public welfare official made under this section the public welfare official shall be deemed a preferred creditor.

"2. No right of action shall accrue against an infant by reason of the assistance or care granted to him unless at the time it was granted the infant was possessed of money and property in excess of his reasonable requirements as described in section one hundred one."

[3] "§360. *Real property of legally responsible relatives; deeds and mortgages may be required*

"1. The ownership of real property by an applicant or applicants, recipient or recipients who is or are legally responsible relatives of the child, children, minor or minors for whose benefit the application is made or the aid is granted, whether such ownership be individual or joint as tenants in common, tenants by the entirety or joint tenants, shall not preclude the granting of aid to dependent children or the continuance thereof if he or they are without the necessary funds to maintain himself or themselves and such child, children, minor or

tions,[4] New York welfare officials took from Mrs. Snell a "Pledge Agreement" and "Assignment of Proceeds of Sale" relating to her cooperative apartment. Under the terms of these instruments, Mrs. Snell has obligated herself to repay the cost of all public assistance and care currently

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minors. The public welfare official may, however, require as a condition to the granting of aid or the continuance thereof, that he be given a deed of or a mortgage on such property in accordance with the provisions of section one hundred six.

"2. However, while the property covered by the deed or mortgage is occupied, in whole or in part, by the responsible relative who gave such deed or mortgage to the public welfare official or, during his minority, by a child or minor for whose benefit the aid was granted the public welfare official shall not sell the property or assign or enforce the mortgage without the written consent of the department; and, when the property is occupied by such child or minor, such consent shall not be given unless it appears reasonably certain that the sale or other disposition of the property will not materially adversely affect the welfare of such child or minor during his minority.

"3. The net amount recovered by the public welfare department from such property, less any expenditures approved by the department for the burial of the relative, the child or minor who dies while in receipt of aid under this title, shall be used to repay the public welfare district, the state and the federal government their proportionate share of the cost of aid to dependent children granted. The state and federal share shall be paid by the public welfare district to the state and the manner and amount of such payment shall be determined in accordance with the regulations of the department.

"4. If any balance remains it shall belong to the estate of the legally responsible relative or relatives, and the public welfare district shall forthwith credit the same accordingly, and, provided they claim it within four years thereafter, pay it to the persons entitled thereto. If not so claimed within four years it shall be deemed abandoned property and be paid to the state comptroller pursuant to section thirteen hundred five of the abandoned property law.

"5. The proceeds or moneys due the United States shall be paid or reported in such manner and at such times as the federal security agency or other authorized federal agency may direct."

(footnote 4 on following page)

being supplied to her and her children, the obligation being secured by her interest in the cooperative apartment and the Commissioner of Welfare being empowered (subject to authority from the State Welfare Department, Social Services Law §360(2), *supra* note 3) to sell the apartment and apply the proceeds to his claim for assistance furnished. According to the terms of section 360(2), *supra* note 3, the mortgage may not be enforced or assigned without the written consent of the State Department of Social Services while the apartment is occupied by Mrs. Snell and her children, and, further, "such consent shall not be given unless it appears reasonably certain that the sale will not materially adversely affect the welfare" of the Snell children.

Plaintiff Miriam Ramos is the nineteen-year-old mother of three children, all under the age of three, who are dependent upon her alone for support. Her husband is in jail. Since 1963 Mrs. Ramos has been a recipient of AFDC benefits. On February 26, 1967, Mrs. Ramos and her oldest child were injured in an automobile accident. Three months later she was requested, as a condition to her continued receipt of public assistance, to execute an "Assignment of

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[4] "Eligibility for ADC shall be determined for each applicant in accordance with the policies and procedures generally applicable in public assistance. This determination shall include consideration of each of the following factors of eligibility: financial need, age, welfare of child or minor, residence within the State, living arrangements, relationship of child to relative, and deprivation of parental support or care. Where there is emergent need and a presumption of categorical eligibility the preinvestigation grant procedure shall be followed.

"(a) ***Financial need.*** Financial need shall be determined in accordance with approved standards of assistance. A public welfare official may in his discretion require the assignment of real property or other resources of an applicant or recipient who is a parent of the child or minor for whose benefit an ADC grant is made. Refusal by the applicant to assign shall constitute ineligibility for public assistance." ***New York Dept. of Social Services Reg. §18-369.2.***

Proceeds of Lawsuit," a document which assigns (to the extent of assistance received) to the Department of Social Services the proceeds of any personal injury claim arising out of the accident. The assignment was taken pursuant to the general obligation set out in N. Y. Social Services Law §104,[5] and the more specific authority of §104-a.[6]

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[5] See note 2 *supra*.

[6] "§104-a. *Liens for public assistance and care on claims and suits for personal injuries.*

"1. If a recipient of public assistance and care shall have a right of action, suit, claim, counterclaim or demand against another on account of any personal injuries suffered by such recipient, then the public welfare official for the public welfare district providing such assistance and care shall have a lien for such amount as may be fixed by the public welfare official not exceeding, however, the total amount of such assistance and care furnished by such public welfare official on and after the date when such injuries were incurred.

"The welfare commissioner shall endeavor to ascertain whether such person, firm or corporation alleged to be responsible for such injuries is insured with a liability insurance company, as the case may be, and the name thereof.

* * * * *

"10. The provisions of this section shall not be deemed to adversely effect the right of a public welfare official who has taken an assignment of the proceeds of any such right of action, suit, claim, counterclaim or demand, to recover under such assignment the total amount of assistance and care for which such assignment was made.

* * * * *

"12. The provisions of this section to the contrary notwithstanding, the public welfare official may in his discretion release to the injured person an amount not to exceed the cost of two years' maintenance from the lien herein created.

"This section shall not apply to any claim or award which is or may be allowed pursuant to the provisions of the workmen's compensation law or the volunteer firemen's benefit law."

(continued on following page)

The third plaintiff, Juan Malave, is the father of eight minor children. He earns $86 weekly and is the sole support of his wife and family. Prior to 1967 Mr. Malave had received AFDC benefits for brief periods, in 1955 and 1965. However, in March, 1967, he suffered personal injuries on

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The assignment technique is more specifically authorized by Policies Governing the Administration of Public Assistance, City of New York, Department of Welfare §184:

"When a recipient or any member of the family receiving public assistance sustains or has sustained a personal injury, the Department shall determine whether legal action has been or can be instituted. The potential proceeds of a personal injury action or death claim are subject to the following:

"a. *Protective Action.* The potential proceeds of the recipient's action shall be subject to protective action through an assignment. When an assignment of the proceeds of a recipient's personal injury or death claim is taken by the Department, any monies becoming available are subject to the Department's claim to the extent of the net proceeds.

"b. *Disposition of Funds on Recovery or Settlement.* Upon a recovery or settlement, the recipient may pay, out of the gross proceeds, an amount sufficient to meet the attorney's fees, medical costs related to the injuries, hospital liens and all other expenses and disbursements incident to the injury. The net proceeds are applied towards the repayment of public assistance granted. The Department may permit the recipient to retain, out of the net proceeds, an amount equal to two years' budget needs computed on a public assistance basis disregarding any income.

"The decision to authorize the release of funds equal to two years' budget needs requires special approval.

"When the release of such funds would be inadvisable, or when fraud or concealment of assets has occurred, the Department reserves the right to refuse the release of all or part of the two years' budget needs, subject to special approval.

"Funds secured through recovery or settlement of a personal injury action may be used, in appropriate cases, to establish burial reserves * * *."

the premises of the public housing project where he lives, and was unable to continue working; for several months the family received emergency AFDC assistance and disability insurance checks. In March, 1967, plaintiff Malave received $400 from the New York City Housing Authority as compensation for his injuries. These funds have been exhausted in providing necessities for the family.

The New York recovery provisions have been applied to Mr. Malave in the following ways: by requiring the endorsement over to the Department of Social Services of one of three disability insurance checks; and by asserting on June 13, 1967, a "Notice of Lien" in the amount of $420.29 for assistance furnished since the accident and after the receipt of the Notice. The same provisions invoked against plaintiff Ramos were the claimed authority in the case of Mr. Malave.[7]

Plaintiff Helen Marley is a sixty-eight year old chambermaid who has worked for the YWCA since 1954. She currently earns $30 for a twenty-hour work week and supports herself solely on this salary and Social Security benefits totalling $86 a month. Her only asset is a $600 bank account.

In 1943 Miss Marley became ill with cancer, and from 1945 to 1954 she was sustained on public assistance totalling $4,000. During this time of sickness and despondency, she assigned to the Department of Social Services an insurance policy on her life. With the help of a cousin Miss Marley finished paying the premiums on this policy in 1967. However, the insurance company will not release the proceeds of the policy to plaintiff Marley because of the prior assignment to the Department of Social Services. The

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[7] See note 6 *supra*.

statutory authority for the public welfare official's action is section 105 of the Social Services Law.[8]

Robert Whaley is a twenty six year old welfare recipient who lost his right leg in an accident on a New York City subway platform on July 31, 1966. Prior to this misfortune plaintiff Whaley earned his living as a free lance photographer, a career which he hopes to resume. Eleven months after the accident, on June 30, 1967, Mr. Whaley applied for assistance in the form of Aid to the Permanently and Totally Disabled (APTD).[9] As a condition to granting this aid, the Department requested and received, pursuant to section 104-a,[10] an "Assignment of Proceeds of Lawsuit," which imposes the obligation to repay assistance out of the eventual personal injury recovery, if any, that plaintiff receives.

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[8] "§105. *Claims on insurance*

"If a person, who has received public assistance or care, shall die leaving insurance, and the estate of the assured is named as beneficiary, or no beneficiary is named, the public welfare official shall be entitled to a preferred claim to be paid out of such insurance to the amount of the cost of such assistance and care, and for funeral expenses not to exceed two hundred fifty dollars. If the insured leaves a widow or minor children who are, or are liable to become, public charges, the public welfare official may, in his discretion, waive his claim to such insurance or any part thereof to which he would otherwise be entitled."

[9] APTD is a categorical assistance program operating in the same federal-state type of partnership as that described in note 1 relating to AFDC. Federal authorization for the program is found in 42 U. S. C. §§1351-55 (1964), as amended (Supp. 1967), one purpose being to enable "each State to furnish financial assistance * * * to needy individuals eighteen years of age and older who are permanently and totally disabled" and to encourage each State "to furnish rehabilitation and other services to help such individuals attain or retain capability for self-support or self-care * * *." 42 U. S. C. §1351. New York has elected to join the program pursuant to N. Y. Social Services Law §300 *et seq.*

[10] See *supra* note 6.

In addition to the foregoing facts, which are not in dispute, plaintiffs have adduced some deposition testimony bearing mainly upon a species of "constitutional fact"—consisting, at least in large measure, of expert judgments designed to show that the New York repayment requirements are onerous, destructive of morale, and, generally, so negative in their impact on effective rehabilitation as to be arbitrary and irrational. Such testimony emanates mainly from Miss Barbara Lounds, a social work consultant, and Dr. Charles Grosser, assistant professor at the New York University School of Social Services, both extensively experienced in working with and for poor people. Among other things, these experts state that assignments of life insurance policies deprive welfare recipients of an effective symbol of independence and accomplishment; that there is similar symbolic import in the family home or apartment; that assignments of personal injury claims breed "tremendous resentment"; and that, in general, "any social work purpose in the recovery provisions is quite beyond • • • comprehension." Moreover, these witnesses testify, enforcement of the recovery requirements tends to cause return to the welfare rolls of people who might otherwise postpone or avoid such renewed dependence.

Also in the record are depositions of the defendant Commissioners—both of whom, as the court may notice, have careers of recognized distinction for scholarship and active service in the field of social work.[11] Both Commissioners

[11] Considering the subject matter and where we sit, it may be permissible, too, that we acknowledge an awareness of the sensitive and imaginative efforts with which Commissioner Ginsberg has been seeking to attack the basic needs of welfare "clients"—not least the need for self-respect and independence through productive work. See, e.g., N. Y. Times, Jan. 28, 1968, p. 1, col. 2; *id.*, Jan. 15, 1968, p. 1, col. 4.

acknowledged that there are imperfections in existing welfare programs, and indicated their concern to seek improvements. Commissioner Ginsberg reaffirmed his published view that welfare assistance should be (though it may not be by either the state or federal legislature) viewed "as an entitlement and a right rather than as a handout." Neither found the recovery requirements significant deterrents to seeking welfare benefits though Commissioner Ginsberg listed a variety of reasons (pride, resentment of investigative procedures, etc.) why eligible people fail to apply. Commissioner Wyman expressed the view that the New York repayment requirements, as they are administered and limited, have no adverse effect upon the desire to become self-supporting. Asked if the provisions affirmatively promote this desire, Commissioner Ginsberg said:

> "I don't know that they do basically. You have, of course, a dual responsibility.
>
> "One is to the client and the other is to the accountability of the appropriate use of the public funds. * * * I think this provision goes to the second objective."

II.

Before stating and ruling upon plaintiffs' contentions, it will be useful to note the dimensions and the context of our problem. On the facts before us, recipients of assistance under the programs involved are subject to three forms of repayment obligation:

(1) A lien on interests they own in real property—specifically, Mrs. Snell's interest in her cooperative apartment.

(2) A lien on potential or actual recoveries for personal injuries—illustrated here in the cases of plaintiffs Ramos, Malave, and Whaley.

(3) An assignment of the interest of an insured recipient in life insurance policies, evidently under New York Social Services Law §105, which allows for recovery of welfare assistance payments from such policies in cases where "the estate of the assured is named as beneficiary or no beneficiary is named" the subject of complaint by plaintiff Marley.

While §104 of the New York Social Services Law (note 2, *supra*) appears on its face to authorize public welfare officials to recover "the cost of * * * assistance and care" from any "real or personal property" of the recipient (subject to a 10 year limitations period), authoritative regulations substantially limit this power. Notably, it is provided by regulation, and unequivocally represented to this court, that no such recovery may be sought from wages or salaries or from property acquired with such earnings.[12] This restriction, if we had nothing more before us, could probably be taken as an authoritative confinement of the statutory

[12] "No referral [for recovery purposes] shall be made if the newly acquired assets consist solely of income from employment." *Policies Governing the Administration of Public Assistance*, City of New York Department of Welfare (reissued August 1, 1963) §189.

The uncontradicted deposition testimony of the defendant State Commissioner (at pp. 11, 25, and 27) reports that the policy exempting earnings is state-wide. There is no dispute between the parties on this subject. In any event, we have only City people before us. And none of these plaintiffs claims that his earnings have been or will be pursued for recovery. Compare note 27, *infra*. Judge Kaufman mentions, however, that plaintiff Marley may conceivably have used earnings to pay her insurance premiums. That could be, but she has not said so here nor has she indicated to the administrative officials that the exemption of earnings should inure to her benefit to any degree. We perceive no reason in this state of affairs why a three-judge court should explore further a *conceivable* violation of a regulation which Mrs. Marley neither asserts nor has mentioned to the officials bound by that regulation.

power, cf. *Phyle* v. *Duffy,* 334 U. S. 431, 441 (1948); *Gerende* v. *Election Board,* 341 U. S. 56 (1951), discussed in *Whitehill* v. *Elkins,* —— U. S. —— (1967), 36 U. S. L. W. 4006 (Nov. 7, 1967), and would probably be enforceable against the welfare authorities in any event, *Yellin* v. *United States,* 374 U. S. 109, 121 (1963); *Service* v. *Dulles,* 354 U. S. 363, 379-80 (1957); *Accardi* v. *Shaughnessy,* 347 U. S. 260 (1954); *Bridges* v. *Wixon,* 326 U. S. 135, 153 (1945). Moreover, we have no plaintiff before us from whom recovery has been sought out of the fruits of gainful employment and no suggestion in the record that the regulation and representations denying any such practice are not accurate reflections of the facts. Accordingly, whether or not it makes a constitutional difference, it is worth mentioning that none of the provisions plaintiffs attack have any deterrent or discouraging effect upon the incentives of welfare recipients to improve their lot by seeking and engaging in productive employment.

To complete this brief sketch of our context, it may well be of at least some constitutional significance (as we note again below) that provisions for repayment by persons who receive welfare assistance are contained in the laws of some thirty-two states.[13] And the only decisions on the subject disclosed by our research have rejected constitutional attacks generally similar to those mounted by plaintiffs in this case. *Lalic* v. *Chicago, Burlington & Quincy R.R.,* 263 F. Supp. 987 (N. D. Ill. 1967); *Newland* v. *Child,* 73 Idaho

[13] See *Leland* v. *Oregon,* 343 U. S. 790, 798 (1952); and see *Characteristics of State Public Assistance Plans Under the Social Security Act,* Public Assistance Report No. 50 (U. S. Dept. of Health, Education and Welfare 1964 ed.). The cited Report shows laws of this kind for 34 States. Since its issuance, however, two States (Michigan and West Virginia) have repealed their statutes.

530, 254 P. 2d 1066 (1953); *Beck* v. *Buena Park Hotel Corp.*, 30 Ill. 2d 343, 196 N. E. 2d 686 (1964); *Donoho* v. *O'Connell's, Inc.*, 18 Ill. 2d 432, 164 N. E. 2d 52 (1960); *Dimke* v. *Finke*, 209 Minn. 29, 295 N. W. 75 (1940); *Wallberg* v. *Utah Public Welfare Comm'r*, 115 Utah 242, 203 P. 2d 935 (1949).[14]

III.

While plaintiffs' briefs are neither terse nor tightly organized, their constitutional arguments appear ultimately to fall under three headings: first, that the state recovery provisions deny the due process guaranteed by the Fourteenth Amendment; second, that they deny the equal protection of the laws required by that Amendment; and, third, that they conflict with federal social security legislation, thus contravening the Supremacy Clause of Article VI, Clause 2. We consider the arguments in the order stated.[15]

Due Process

1. *Alleged irrationality of the legislative judgment*

The repayment provisions are said by plaintiffs to be arbitrary, oppressive, and irrational. This is so, they say,

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[14] We are not unaware of the burgeoning problems of bringing legal services to the poor and exploring such relatively untrodden areas as the one here in question. Nor do we suppose that the few precedents "in point" can be taken as dispositive on subjects like this. It would be helpful, nevertheless, when it is proposed to break new constitutional ground, to have briefs which at least mention the pertinent learning already in the books.

[15] Before dealing with the merits, defendants urge that this is a case for application of the somewhat diminished doctrine of "abstention." But there appear to be no valid grounds for abstaining, and we have had, since the briefs were filed, controlling authority that compels rejection of this course. See *Damico* v. *California*, —— U. S. —— (1967), 36 U. S. L. W. 3254.

because the State, by this requirement, defeats its own stated objective of seeking to make welfare recipients productive and self-supporting. Further, they argue, by demanding liens upon small property interests or contingent rights to recover for personal injuries, the statutes "tend to frustrate desire for human dignity and independence." Citing their deposition witnesses expert in the field of social work, they urge that the assignment of real property interests "is disastrous from a social work point of view." More broadly, it is argued, the effort to reach forms of property other than realty has similar consequences of affronting human dignity and impeding the objective of rehabilitation. Plaintiffs denounce as trivial and insufficient what they find to be the "only conceivable rationale" of these recovery provisions—"to attempt to save the state money." The objective cannot justify the hurt, they say, and is not really served in any case because the amounts recovered are minuscule in comparison with the total of welfare expenditures.[16] Among the vicious consequences of the State's recovery demands, plaintiffs report, is the refusal of people eligible for welfare benefits to apply for them because they are unwilling to have liens put upon their real property, insurance policies, or personal injury claims.

We do not stop to analyze these arguments in particular detail. We note only by the way some patent difficulties in the things plaintiffs say: (1) Their major thesis that the State has undercut its own statutory objective of rehabilitation is hardly a point going to federal due process. (2) If it mattered, we might doubt the standing of persons accepting assistance to complain that other, unidentified

[16] For 1966, the briefs tell us, recoveries amounted only to some $5,000,000 as against state welfare expenditures of about $1,200,000,000.

people refuse welfare payments because of the conditions plaintiffs question. (3) There is no point in dwelling upon the repeated suggestion that personal injury recoveries are designed to make people "whole," so that exactions from such funds deny due process by making them less than "whole." It seems sufficient to say that the Constitution we are supposed to expound gives us no authority to follow the figurative trails of metaphors like this.[17]

Apart from such passing observations, we assume that rational men could agree fully with plaintiffs' view that the painful consequences of the recovery statutes outweigh the measurable benefits the State seeks from them. We also accept without questioning the view of the scholar who testified in his deposition that "any social work purpose in the recovery provisions is quite beyond [his] comprehension." The plain flaw that none the less destroys plaintiffs' thesis is that it is brought to the wrong forum. Plaintiffs' complaints might move us to vote for changes if we sat as state legislators. But they do not approach the showing of irrationality or arbitrariness warranting exercise of the limited veto power of the federal judiciary under the Fourteenth Amendment.

Against plaintiffs' views, as defendants point out, there are arguments of policy which can scarcely be dismissed as frivolous, whether or not we would find them convincing if the judgments of policy were for us. The State is entitled, they note, to consider relative need and available resources in distributing its limited welfare funds. Even

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[17] Consider the applicant who has no assets except $500,000 recovered to make him "whole" in a personal injury suit. Would anyone suppose a welfare department must, or could, declare him eligible? For constitutional purposes, the hypothetical question of eligibility is not different from the question of personal injury *claims* as sources of potential recovery.

"trivial" recoveries like $5,000,000 need not be deemed beneath notice. Whether they are correct or not, legislators could plausibly judge that a sense of obligation to contribute or repay if possible serves some function relevant to the concern for human dignity. Moreover, the objectives of rehabilitation and self-support are not seriously impeded at all; by exempting earnings, the statutes, as they are administered, leave wholly unfettered the desire and search for independence through gainful work.

We sketch these countervailing points for the single purpose of indicating what seems plain to us—that we could hold the statutes unconstitutional only if we were invested by the "convenient vagueness" of the Due Process Clause[18] with a power, long since denied us, to invalidate state laws "because they may be unwise, improvident or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955); see also *Nebbia* v. *New York*, 291 U. S. 502, 537-38 (1934); *Olsen* v. *Nebraska*, 313 U. S. 236, 246-47 (1941); *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80, 82-83 (1946); *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952); *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 47-48 (1966). To be sure, cases like those just cited reflect mainly the recognition of our highest Court during the last thirty years or so that it does not sit as final arbiter of state social policies affecting matters of business and industrial regulation. (Note, however, the claims of personal "liberty" involved in *Ferguson* v. *Skrupa*, 372 U. S. 726, 729-32 (1963); *Fay* v. *New York*, 332 U. S. 261, 281, 294-96 (1947); *Jacobson* v. *Massachusetts*, 197 U. S. 11, 28, 30-33 (1905).) And, it is said, the subject of welfare administration, where the primitive needs of

[18] Hough, *Due Process of Law—Today*, 32 Harv. L. Rev. 218 (1919).

desperate people are at stake, is altogether different. There is a difference, certainly, but not a constitutional one—not any that commissions us to tell those the people elect how they should resolve competing values of the kind here in question.[19]

It is appropriate from time to time to appreciate the full measure and continued vitality of what Mr. Justice Holmes meant when he said: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner* v. *New York*, 198 U. S. 45, 75 (1905) (dissenting). Now that his dissenting thought has won the day, we ought not to trivialize the achievement by viewing it only as the interment of Spencer's social doctrines. The principle applies to the social philosophers that most of us, including judges, find more persuasive than Spencer. If we were free to enforce what we may modestly deem our more enlightened view, we might seriously consider the changes plaintiffs propose. But we have no such power, and it is better in the end for everyone that this is so.

We were reminded only the other day, though the context was different, of the basic principle: "The purpose of

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[19] There is no question, of course, that state action respecting welfare is as subject to the Fourteenth Amendment as other exertions of state power. This decision is not rested upon any suggestion that welfare assistance is a "privilege" rather than a "right" and therefore outside the purview of the Due Process and Equal Protection Clauses. Cf. *Sherbert* v. *Verner*, 374 U. S. 398, 404-06 (1963); *Flemming* v. *Nestor*, 363 U. S. 603, 608-11 (1960); *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 239 n. 5 (1957); *Gonzales* v. *Freeman*, 334 F. 2d 570, 574 (D. C. Cir. 1964). See also O'Neill, *Unconstitutional Conditions: Welfare Benefits With Strings Attached*, 54 Calif. L. Rev. 443 (1966). Our point is the narrower one that the limited right of substantive due process insures only against capriciousness reaching a level of irrationality, not against judgments of policy that may be unwise or even "harsh" in their balancing of competing interests.

the Constitution and the Bill of Rights, unlike the more recent models promoting a welfare state, was to take government off the backs of people." *Schneider* v. *Smith,* —— U. S. —— (1968), 36 U. S. Law Week 4131, 4133. The principle counsels that it is not for federal judges to be "liberal" or "conservative" in advancing and ordering measures which undoubtedly relate to basic matters of human decency and welfare. The constricted test in this forum is one of minimal rationality. By that test plaintiffs' due process argument must fail.

2. *The charge of vagueness*

There is a suggestion in plaintiffs' brief, somewhat obscurely expressed, that the New York recovery provisions deny due process because of the overbreadth with which they are drawn. The "vagueness" is said to inhere in the grant of discretion by which public welfare officials "*may*" demand assignments, enforce liens, or institute recovery actions. See N. Y. Social Services Law, §§104, 104-a, 105, and 360, notes 2, 3, 6, and 8 *supra.* It is not altogether clear whether the argument is meant as a proposed extension of the void-for-vagueness doctrine as it applies to problems of free expression, e.g., *Kunz* v. *New York,* 340 U. S. 290, 293-94 (1951) and criminal liability, e.g., *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939), or whether the claim relates to a supposed excess in delegating power to administrators. On either formulation, the position is not sound.

The problem of "delegation," so denominated, may be put quickly to one side. The separation-of-powers principle, however pervasive it may be in American governments, is not in itself enforceable against the States as a matter of federal constitutional law. See *Sweezy* v. *New Hampshire,* 354 U. S. 234, 255 (1957).

Viewed as a charge that the state statutes are fatally "vague and standardless," *Giaccio* v. *Pennsylvania,* 382 U. S. 399, 402 (1966), plaintiffs' theory fares no better. To begin with, it is not the case that the public welfare officials are left at large in enforcing the recovery provisions. The statutory complex reveals pertinent criteria,[20] including notably the mandate in Social Services Law §131(1) that the responsible officials must, "whenever possible, administer such care, treatment, and service as may restore • • • [needy] persons to a condition of self-support or self-care • • •." This guideline would appear, at least in part, to account for the significant exemption, by administrative regulation, for employment earnings.

Apart from the fact that the statutory subject matter provides explicit and implicit considerations to channel the exercise of discretion, plaintiffs' attack upon the existence of such leeway suggests an essentially absurd alternative of mandatory enforcement. Would they, or anyone, be better off if the statutes said welfare officials "must" rather than "may" insist upon recovery in every case?[21] The rhetorical question calls to mind the numerous and inescapable areas where decisions on the invocation of enforcement powers must be and are confided to discretion —for example, in pardoning, prosecuting, and sentencing.

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[20] Cf. *State* v. *Griffiths,* 152 Conn. 48, 57, 203 A. 2d 144, 149 (1964), upholding discretion of welfare commissioner to determine financial ability of certain relatives to contribute support. The Court found adequate standards woven through the rest of the chapter relating to AFDC.

[21] We do not suggest, obviously, that such an unqualified directive would be the only possible alternative to the grant of discretionary power as it stands. It would be, however, a permissible alternative under the view we take of the state legislative power.

To argue, as plaintiffs do, that the very existence of such latitude offends the Federal Constitution is to suggest a fantastic judicial power to stop the States from governing. Cf., e.g., *Oyler* v. *Boles*, 368 U. S. 448, 454-56 (1962); *Williams* v. *New York*, 337 U. S. 241 (1949); *Moog Industries, Inc.* v. *F. T. C.*, 355 U. S. 411, 413 (1958); *Gross* v. *Bishop*, 377 F. 2d 492, 494 (8th Cir. 1967); *Moss* v. *Hornig*, 314 F. 2d 89 (2d Cir. 1963); *United States* v. *Shaughnessy*, 180 F. 2d 489, 491 (2d Cir. 1950).[22]

This is not to say, of course, that the power to mitigate the law's literal exactions is beyond constitutional scrutiny. Arbitrary or invidious *application* in any area may transgress the bounds of fundamental fairness and equality set by the Fourteenth Amendment. Cf., e.g., *Accardi* v. *Shaughnessy*, 347 U. S. 260, 268 (1954); *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 367-68 (1932); *Corporation Commission* v. *Lowe*, 281 U. S. 431, 438 (1930); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366 (1886); *Gross* v. *Bishop*, *supra*, 377 F. 2d at 495. But there is no showing by plaintiffs of capriciousness or irrational discrimination in the application of the recovery provisions, either generally or, more importantly, to plaintiffs themselves. Urging that the statutes be erased sweepingly on their face, plaintiffs ignore the fact that the discretion conferred upon administrators is subject to test and check both in administrative "fair hearings," N. Y. Social Services Law §§304(4) (APTD) and

[22] Compare with the provisions here in question Section 204 of the Social Security Act, 49 Stat. 624, as amended January 2, 1968, 53 Stat. 1368, 42 U. S. C. §404, which provides for recovery of overpayments and states in subsection (b): "In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this title or would be against equity and good conscience."

353(2) (AFDC), and on judicial review under N. Y. CPLR Article 78. Cf. *Laackman* v. *McManus,* 43 Misc. 2d 382, 251 N. Y. S. 2d 191 (Sup. Ct. 1964); *Greenwood* v. *Taylor,* 270 App. Div. 849, 60 N. Y. S. 2d 452, *rearg. denied,* 270 App. Div. 1024, 63 N. Y. S. 2d 216 (1946). And see *Bourjois Inc.* v. *Chapman,* 301 U. S. 183, 189 (1937); *American Power Co.* v. *S. E. C.,* 329 U. S. 90, 105 (1946).

Plaintiffs are wrong in believing that this is a case appropriate for holding statutes invalid on their face. This is not a situation, like that most familiarly encountered under the First Amendment, where the very existence of the enactment serves to "chill" or otherwise impair the exercise of protected freedoms. E.g., *Thornhill* v. *Alabama,* 310 U. S. 88, 98 (1940); *NAACP* v. *Button,* 371 U. S. 415 (1963). In other contexts, even where criminal liability is in issue, the adequacy of the statutory message is normally to be appraised "not only in terms of the statute 'on its face' but also in the light of the conduct to which it is applied." *United States* v. *National Dairy Corp.,* 372 U. S. 29, 36 (1963). That restraining principle applies *a fortiori* to the statutes here in question.

Equal Protection

Considerations similar to those just canvassed apply to this branch of plaintiffs' argument.

Plaintiffs list several "discriminations" which result, in their view, in a denial of equal protection:

(1) That the State supplies many benefits for which it does not seek repayment—Medicaid, public education, free milk, museums, etc.

(2) That the State discriminates between those who have property and those who do not.

(3) That the State makes arbitrary and indefensible distinctions when it puts liens on personal injury claims but exempts from such burdens workmen's compensation awards and benefits paid under the Volunteer Firemen's Benefit Law.

There is no "logic" in such distinctions, plaintiffs say. But neither the inapposite appeal to "logic" nor any ground of constitutional law supports their view.

Like the life of the law generally, the Fourteenth Amendment was not designed as an exercise in logic. It is ancient learning by now that a classification meets the equal protection test "if it is practical, and is not reviewable unless palpably arbitrary." *Orient Insurance Co.* v. *Daggs,* 172 U. S. 557, 562 (1869). If the classification has "some reasonable basis," it cannot be held offensive to the Equal Protection Clause "because it is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78 (1911). "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61, 69-70 (1913).

Measured against such familiar teachings, plaintiffs' arguments verge upon (or reach) the frivolous.[23] It will

[23] The characterization seems fully merited when plaintiffs arrive at their denunciation of the distinction between people who do and people who do not have money or other property. It would be difficult to conceive of a more pertinent criterion for welfare assistance unless or until someone urges (as plaintiffs do not appear to be urging) that a "means test," whatever issues of policy it may raise, must be outlawed under the Constitution.

be sufficient to discuss briefly their relatively plausible contention that the exemptions for workmen's compensation and volunteer firemen's awards render invalid the lien upon personal injury claims.

The special concerns which led to singling out the groups benefited by workmen's compensation laws are too well known by now to warrant restatement here. In a way, plaintiffs' views on this subject are reminiscent of unsuccessful arguments in another era that the laws were invalid because they excluded from coverage some classes of working people. E.g., *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 157-60 (1919); *New York Central R.R.* v. *White*, 243 U. S. 188, 208 (1917). However that may be, there are characteristic features of New York's Workmen's Compensation Law which further the refutation of plaintiffs' position. Section 33 of that Law exempts benefits "from levy, execution and attachment or other remedy for recovery or collection of a debt." There is no comparable general exemption for personal injury recoveries. Workmen's compensation benefits are generally given in small, periodic payments under schedules which exclude the kinds of uncertain and potentially substantial recoveries in personal injury suits for pain and suffering.

Equally pertinent details bear mention, without being essential, on the subject of benefits for volunteer fireman. The statutes providing such benefits declare and assume a public debt to volunteer firemen for "service which [they] render to others without remuneration." N. Y. Volunteer Firemen's Benefit Law §2. In this way, the State undertakes both to encourage service of this kind and to recognize a "moral obligation" upon the community to compensate at least for injury or death incurred in the line of such duty. See *Bauman* v. *Town of Irondequoit*, 204 Misc. 494,

500, 122 N. Y. S. 2d 47, 52, aff'd, 282 App. Div. 916, 125 N. Y. S. 2d 250 (1953), *aff'd* 307 N. Y. 926, 123 N. E. 2d 574 (1954).

The exemptions plaintiffs attack do not approach the kind of caprice which could generate serious doubts under the Equal Protection Clause. We agree with and follow the views of Justice Schaefer, rejecting for a unanimous Court essentially the same arguments under an essentially similar statutory scheme. *Donoho* v. *O'Connell's, Inc.*, 18 Ill. 2d 432, 164 N. E. 2d 52, 55-56 (1960):

> "It is true that the statute does not provide comprehensively for a lien upon all potential assets that might be or become available to a recipient. But the validity of legislation does not depend upon complete comprehensiveness, nor does the constitution require that it conform to an ideal pattern of orderliness. It is enough if the selection of subjects for inclusion and exclusion rests upon a rational basis. * * * We think that such a basis exists here.
>
> "The Workmen's Compensation Act, the Workmen's Occupational Diseases Act and the Wrongful Death Act fix maximum limits of recovery, regardless of the extent of the actual loss that was sustained. Payments under the Workmen's Compensation and Occupational Diseases acts are ordinarily made periodically and liens upon those payments are forbidden. Ill. Rev. Stat. 1959, chap. 48, pars. 138.21, 172.56. * * * The limited recoveries under these statutes do not include an allowance for pain and suffering, an element of damage which looms large in personal injury cases. It is common knowledge that the amounts recovered under these statutes are far smaller than amounts recovered in common-law actions. These are genuine

differences of situation, which will support legislative classification. Furthermore, the small amount of the periodic payments under the Workmen's Compensation and Occupational Diseases acts might make collection a difficult and expensive task, and the legislature could properly act upon this practical consideration."

See to similar effect the cases cited at the end of "II," *supra.*

A few words should be added to deal with plaintiffs' reliance upon recent decisions which have struck down statutes requiring a prior period of state residence as a condition of eligibility for welfare assistance, *Thompson* v. *Shapiro,* 270 F. Supp. 331 (D. Conn. 1967); *Green* v. *Department of Public Welfare,* 270 F. Supp. 173 (D. Del. 1967); *Smith* v. *Reynolds,* —— F. Supp. —— (E. D. Pa. 1967),[24] and upon a decision invalidating a state regulation which made the immoral conduct of the mother grounds for denying AFDC assistance to her children, *Smith* v. *King,* —— F. Supp. —— (M. D. Ala. 1967). We do not presume to question any of these cases, the results of which are scheduled for early examination by the Supreme Court.[25] It is enough to say that they are clearly distinguishable from this one. Residence requirements, resulting in denials of aid as compared with grants conditioned upon obligations to repay, touch an always delicate subject of discrimination favoring state residents over non-residents.

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[24] *Contra: Harrell* v. *Board of Commissioners of District of Columbia,* 269 F. Supp. 919 (D. D. C. 1967).

[25] Probable jurisdiction has been noted in the cases of *Thompson* v. *Shapiro* (No. 813, Jan. 15, 1968) and *Smith* v. *King* (No. 949, Jan. 22, 1968).

They have been thought, moreover, by the courts finding invalidity, to trench upon a specifically defined constitutional freedom, the right of interstate travel as it was specifically enforced in *Edwards* v. *California,* 314 U. S. 160 (1941). The differences from the situation before us are patent. Similarly far removed is the problem presented by secular commandments that would visit upon children the sins of their parents.

The Supremacy Clause

The Social Security Act contains among its provisions for aid to families with dependent children the statement of a federal purpose to enable recipients of assistance "to attain or retain capability for * * * maximum self-support and personal independence * * *." 42 U. S. C. §601. Similar language appears in the titles relating to assistance for the blind and disabled. 42 U. S. C. §§1201, 1351. Plaintiffs say the New York recovery provisions are in irreconcilable conflict with these federal statutes. The argument lacks merit.

As noted already, New York specifically exempts wages and salaries from the repayment obligation. The statutes plaintiffs attack reach only to property already owned or to acquisitions which have more or less the character of "windfalls"—at least in the sense that such acquisitions do not result from purposeful efforts "to attain or retain capability for self-support or self-care." 42 U. S. C. §1351.

This alone would appear to refute plaintiffs' claim of inconsistency.[26] At any rate, this is certainly not a case

[26] This is not to suggest that the State could not reach earnings. It is merely to say that the case is easier because the State does not undertake to do so.

where "the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" *Kelly* v. *Washington,* 302 U. S. 1, 10 (1937). And although it is true that "[l]ocal regulation which would pass muster under the Due Process Clause might nonetheless fail to survive other challenges to constitutionality that bring the Supremacy Clause into play," *Bibb* v. *Navajo Freight Lines,* 359 U. S. 520, 529 (1959), "unless the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy," *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 766 (1945), the Supremacy Clause is not violated.

There are other, perhaps more decisive answers to plaintiffs' theory. The federal statutes say nothing about repayment, except to recognize and make provision for at least some forms of recovery from people who have received assistance. In providing for computation of grants to the States, the Social Security Act declares that each State's periodic grant is to be "reduced by a sum equivalent to the pro rata share to which the United States is equitably entitled, as determined by the Secretary of Health, Education, and Welfare, of the net amount recovered during any prior quarter by the State * * *." 42 U. S. C. §603(b)(2)(AFDC), §1353 (b)(2)(APTD). If these provisions do not positively *authorize,* they certainly accommodate hospitably, the repayment obligations plaintiffs assail.

Plaintiffs cite committee reports referring to the originals of the foregoing statutes where it was observed that the States might be collecting back from recipients (or their estates) and that such recoveries might happen, "for example, because those persons had been defrauding the State * * *." H. R. Rep. No. 65, 74th Cong., 1st Sess. 17

(1935); S. Rep. No. 628, 74th Cong., 1st Sess. 29 (1935). From these items of legislative history, plaintiffs reason that (a) the "example" of recoveries for fraud was meant to be exhaustive and (b) the implication is to forbid any other kind of recoveries. The reasoning is heady but unpersuasive.

Concluding the thin subject of plaintiffs' Supremacy argument, we recall the wide prevalence among the States of statutes like those in question; the duty of HEW's Secretary to disapprove, and withhold federal funds from, unlawful state programs, 42 U. S. C. §§304, 604, 1204, 1354; cf. *Smith* v. *King*, —— F. Supp. ——, —— (M. D. Ala. 1967); and the apparent acquiescence of Congress (including steady appropriations) over the years in state arrangements which are so common that they must be deemed to be known at least to the responsible and interested Committees of the Congress. There is authoritative weight both in the practical administrative construction by those responsible for the federal programs, *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 490 n. 5 (1960); *F. T. C.* v. *Mandel Brothers*, 359 U. S. 385, 391 (1959); *F. H. A.* v. *The Darlington, Inc.*, 358 U. S. 84, 89-90 (1958); *McLaren* v. *Fleischer*, 256 U. S. 477, 481 (1921), and the seeming acceptance (and support) by the Congress itself of the measures plaintiffs denounce, e.g., cf. *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U. S. 275, 293 (1958); *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116 (1947); *Brooks* v. *Dewar*, 313 U. S. 354, 360 (1941); *Alaska Steamship Co.* v. *United States*, 290 U. S. 256, 262 (1933). Against arguments as tenuous as the ones plaintiffs marshal, such considerations alone would be sufficient to sustain the state legislation.

We conclude, in sum, that the complaint is without merit. Judgment will be entered ordering its dismissal."

It is so ordered.

Dated: New York, New York
February 29, 1968

/s/ CHARLES M. METZNER
United States District Judge

/s/ MARVIN E. FRANKEL
United States District Judge

APPENDIX C

Dissenting Opinion of the District Court

KAUFMAN, *C.J.*

I do not dispute several commonplace principles set forth in the majority opinion. For example, I agree that the State of New York has the primary responsibility to develop standards for the distribution of the resources allocated to public assistance programs in which it has elected to participate. I agree also that the state may legitimately attempt to conserve resources by imposing some obligation to repay on persons who receive assistance. Nor do I take issue with the well established precept that federal courts sitting in constitutional judgment of state statutes should be guided by counsels of self-restraint so that "ill starred adventures of the judiciary [do not] jeopardize its essential usefulness." R. Jackson, The Struggle for Judicial Supremacy 321 (1941). My point of difference with the majority turns on whether the means adopted by the State of New

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[27] In their complaint plaintiffs asserted their cause as a class action. We have had no submissions from either side on the questions to be considered under Fed. R. Civ. P. 23 before determining whether the suit is properly maintainable as one on behalf of a class. On the small record as it stands, there is uncertainty whether plaintiffs may be deemed adequate representatives of anyone but themselves. Cf. *Hansberry* v. *Lee,* 311 U. S. 32 (1940); Fed. R. Civ. P. 23(a). In the circumstances, since the complaint is being dismissed, there is no substantial reason why we should purport to "bind" others, apart from any temporary or permanent effect this decision may have as *stare decisis.* Accordingly, it is recorded that no sufficient grounds have been shown for deeming this a class suit and that the judgment of dismissal will "include" (in the language of Rule 23) only the named parties.

York[1] economically and effectively to further the objectives of public assistance deprive these recipients of the liberty and equality secured to them by the Fourteenth Amendment.

Where the state regulates or interferes with fundamental aspects of freedom, "precision of regulation must be the touchstone." *Griswold* v. *Connecticut,* 381 U. S. 479, 498 (1965), quoting *NAACP* v. *Button,* 371 U. S. 415, 438 (1963). If a statute or regulation impinges on critical personal interests, we are required to subject it to closer scrutiny, and to search with care for adequate justification. We must ascertain, therefore, whether the restriction is reasonably related to the public interest the legislature sought to secure, and if it could have been as effectively secured with less abrasive impact on the personal right involved. Because I believe the scheme designed by New York does not withstand the requisite inquiry, I disagree with my brothers. I hasten to add that I do not dissent because I believe that it is beyond the power of the state to devise a rational recovery provision. Instead, I am of the view that by reason of the seriousness of the personal interest involved, the inelegance of the scheme designed, the ease of correcting it by more discriminating methods, and the insubstantiality of the interest served, the State of New York has not acted with adequate precision. Where substantial challenge is made to state regulations imping-

[1] The plaintiffs before us received public assistance under programs administered by the Commissioner of Social Services in New York City and we are thus presented with statutes as applied in New York City. The policy of exempting savings derived from accumulated income, quoted by Judge Frankel at note 12 *supra,* is a directive issued by the Commissioner of Social Services for the City of New York. The defendant State Commissioner, however, has stated that the policy exempting earnings is statewide.

ing upon increasingly important yet largely overlooked aspects of personal liberty, I believe the federal courts are obligated to do more than dismiss the complaint with facile reference to judicial attitudes toward state attempts to regulate business interests in order to foster personal dignity.

The recovery obligation as enforced by New York City fails to meet the test of minimal rationality. It does not distinguish between true and substantial windfalls that are unrelated to the capacity to retain self-support and property acquired by purposeful effort that is essential to maintain whatever level of independence the welfare recipient has achieved. The policy of exempting accumulated income from attachment is concededly designed to meet this required distinction. I would hold, however, that the state is constitutionally required to go further and to exempt a modest interest in real property or insurance and at least some part of damages recovered for personal injury. It may be true that the Constitution does not impose an affirmative obligation on the state to create the circumstances in which people will become independent and self-supporting. But I do suggest that it does prohibit the State from placing obstacles in the path of efforts to become independent of welfare bounty or to maintain the independence already achieved. The social benefit of public assistance would come to naught if this were not so.

If the property a welfare recipient is able to acquire by legitimate means is subject to attachment without regard to amount, the state thus fails to afford proper scope to one's right to be an independent individual, not compelled to rely on government for the right to exist. The requisite precision and discrimination is not unattainable. It may be achieved by a fixed dollar value exemption, or, with respect

to real estate, by an outright exemption for property used as a residence.[2] And, while we should not concern ourselves with the precise terms of a valid regulatory scheme, we cannot ignore significant imperfections engendered by an indiscriminate obligation to repay the costs of public assistance. To require precision is not, as it is suggested, to demand that the State equalize the economic condition of its citizens. It simply serves to restrain the State from unnecessarily and arbitrarily hindering the personal strivings and ambitions of individuals to escape the inhibiting embrace of poverty.

Under the recovery provisions, Geraldine Snell's $900 interest in a cooperative apartment has been assigned to the Department of Social Services; Miriam Ramos, Juan Malave and Robert Whaley have been obligated to repay the full cost of public assistance from potential recoveries for injuries sustained in accidents; and Helen Marley, who was dependent on public assistance during a serious illness from 1945 to 1954, is unable to obtain the proceeds of a small insurance policy because of a prior assignment to the Department.

It seems to me beyond question that we are dealing here with a facet of liberty. The federal purpose in providing aid to dependent children is, it is agreed, intended to afford

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[2] California, with seventeen other states, imposes no obligation to repay on welfare recipients. In computing eligibility, the California statute indicates the form of exemption that might also be applied to recovery. Thus Section 11261, Ann. Calif. Code, "Welfare and Institutions" does not permit consideration of personal property "directly connected with efforts to become self-supporting." Section 11255 permits AFDC recipients to own realty valued at no more than $5,000. Section 11152 permits a blind, disabled or aged recipient to retain realty, of any value, "if it provides him with a home." Section 11154 permits a reserve "for future contingencies" of $2,000 for a married couple on Old Age Assistance, Aid to the Disabled, or Aid to the Blind programs.

recipients the opportunity to "attain or retain capability for . . . self-support and personal independence . . . ." 42 U. S. C. §601. The freedom to achieve "self-support and personal independence" is within the compass of "liberty" secured by the Fourteenth Amendment against undue restraint. The word "liberty" cannot be defined with precision; it "is not a series of isolated points pricked out . . . [but] a rational continuum," *Poe* v. *Ullman,* 367 U. S. 497, 543 (1961) (Harlan, J. dissenting); *Meyer* v. *Nebraska,* 262 U. S. 390, 399 (1923). Liberty is not "confined to mere freedom from bodily restraint . . . [but] extends to the full range of conduct which the individual is free to pursue" *Bolling* v. *Sharpe,* 347 U. S. 497 (1954).

While the precise contours and boundaries of the term may be vague, its reach is determined from the traditions and history of the land. No principle has firmer roots in that tradition than that the security of meager property interests is an aspect of self-care; that the goals of participatory democracy are furthered by an independent and secure citizenry.[3] We err if this tradition is forgotten. See generally Philbrick, Changing Conceptions of Property in Law, 86 U. Pa. L. Rev. 691 (1938); Reich, The New Property, 73 Yale L. J. 733, 771-774 (1964). It is still true today that "the only dependable foundation of personal liberty is the economic security of private property." W. Lippmann, The Method of Freedom 101 (1934). And Professor Reich has noted that "more than ever the individual

[3] Chapter 29 of Magna Carta declared that "No freeman shall be taken or imprisoned or *disseised of his free tenement,* liberties, or free customs . . . unless by the law of the land." In The Federalist No. 10 James Madison recognized, as John Locke had before him, the connection between liberty and property. The Federalist 52-54 (H. C. Lodge ed. 1888).

needs to possess, in whatever form, a small but sovereign island of his own." Reich, The New Property, 73 Yale L. J. at 774.

The majority carefully reminds us that the purpose of the Bill of Rights was "to take government off the backs of the people." *Supra,* p. 17, quoting *Schneider* v. *Smith,* —— U. S. —— (1968), 36 U. S. L. W. 4131, 4133. But it is just that purpose that commands us to require care and precision from the state when it deals with "matters of human decency and welfare" (*supra,* p. 17)—when the net effect may well be appreciably or unnecessarily to increase the burden on the individual. "Paradoxical though it may seem, the most serious threat to freedom in our programs of public service and public benefits is to the freedom of the recipient. . . . It behooves us to be constantly on our guard lest, out of zeal to better people's lot, we impose on them patterns of behavior in matters in which, under our scheme of things, government ought not to meddle." Willcox, Patterns of Social Legislation Reflections on the Welfare State, 6 J. of Pub. L. 3, 7 (1957).

My brothers also seem to detect a distinction in the New York scheme between acquisitions "which have more or less the character of windfalls" and property acquired by "purposeful efforts to 'attain or retain capability for self-support or self-care'." Whatever the constitutional propriety of this distinction, I cannot see that the statutes before us draw any such line. Nor can I understand how the majority can apply its assumed distinction since we do not know whether Geraldine Snell's apartment interest or Helen Marley's insurance policy were bought solely with "income from employment" or not. Surely the Department was not concerned with the source of the recipients' assets when it protected its claim by prior assignment. I see no reason, therefore, why the burden of raising the

issue should be placed on welfare recipients. If a welfare recipient begins work, extricates himself from welfare, and accumulates $500 or $1000 in income, as I understand the recovery provisions applied in New York City, his obligation to repay will depend on whether his savings are invested in real property (or insurance), or placed in a bank account. In the first illustration, the realty is attached, in the latter the bank account is secure—at least until another Welfare Commissioner determines otherwise. That is not a distinction based on the statutory purpose to encourage independence; and it is not a distinction with rational justification in terms of the state's interest in minimizing public expenditures.

It cannot be argued that the statutes distinguish between property acquired after the period of assistance and that accumulated while on the rolls. Snell had her apartment before receiving aid, and she was obliged to assign it as a condition to participation in the program.[4] In any event, the obligation to repay would attach as firmly if she acquired the property within 10 years after receiving aid. Also, it appears that some premiums on Marley's policy were paid after a long illness with cancer and she was no longer receiving public aid, yet the full proceeds are subject to the lien and beyond her dominion.

Plaintiffs Ramos and Whaley have pending claims for personal injury damages arising out of accidents. Each has assigned the potential recoveries to the Department of

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[4] It should be noted that there is no question here of concealment of assets or fraud. The plaintiffs met the standards of eligibility during the period they received assistance, and their objection is to the obligation imposed to repay costs of assistance after they regain self-sufficiency. The Department of Social Services need not show any fraud or concealment to exercise its right of recovery. See *Hodson* v. *Bloise*, 173 Misc. 69, 16 N. Y. S. 2d 49 (1939); *In re Beaman's Estate*, 171 Misc. 578, 13 N. Y. S. 2d 188 (1939).

Social Services to repay the cost of assistance. Plaintiff Malave actually received $400 from the Housing Authority as compensation for injuries, and the welfare officials have filed a "notice of lien" against these funds. The law provides all persons access to the courts in order that they might seek compensation for injuries caused by another. It is surely inadequate to restore a full measure of comfort to the victims of negligent behavior but it is nevertheless the best means yet devised; Whaley's limb is exchanged for cash, and Ramos' unspecified damage is "corrected" with money—the law can do no more. The money transferred will serve many purposes—not only does it pay for medical care but it replaces income that might have been earned but for the disability and, however crudely, it alleviates suffering by offering material aid. This inept and inexact exchange is described as "making whole". The majority tells us that the Constitution "gives us no authority to follow the figurative trails of metaphors like this." (14) We might not like the trail but it represents a process with clear purposes, and once the design is laid bare it surpasses credulity to deny our authority to examine the relationship of technique to objective.

My brothers would have us believe that for purposes of constitutional inquiry there is little difference between denying eligibility for assistance to one with substantial assets in hand derived from a tort claim, and recovering assistance from a former welfare recipient who succeeds in receiving compensation for injuries. In the first case, however, the victim has the means of immediate subsistence—a test of eligibility; if the recovery had been $500 instead of $500,000 he might still be eligible for aid. In the second, the attachment of a meager recovery can effectively destroy the means for future subsistence independence as well as re-

move the financial comfort given as compensation for physical pain. As a result, self-sufficiency may be jeopardized, and return to relief hastened.

I have more regard than the majority for the contentions made to us by the plaintiffs, supported by their experts, and not refuted by Commissioners Ginsberg and Wyman. The plaintiffs suggest that ownership of a home or insurance policy represents a symbol of independence among the poor, that the protective assignments generate resentment and frustrate social purposes of rehabilitation, and that the obligation to repay, with which we are concerned, exerts a deterrent influence that is partly responsible for the fact that one in two eligibles fails to apply for public assistance. These assertions of the potential detrimental effects of recovery are consistent with the experience and comments of welfare specialists, and the arguments accord with common understanding.[5]

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[5] See generally, Cahn & Cahn, The War on Poverty: A Civilian Perspective, 73 Yale L. J. 1317 (1964); tenBroek & Wilson, Public Assistance and Social Insurance—A Normative Approach, 1 U. C. L. A. L. Rev. 237 (1954); Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L. J. 1245 (1965); Wickenden & Bell, Public Welfare—Time for A Change (1961); Wickenden, Memorandum: Poverty and the Law, The Constitutional Rights of Assistance Recipients, March 25, 1965; Moynihan, The Crisis in Welfare, The Public Interest, p. 3 (Winter, 1968); Advisory Council on Public Welfare, Report to the Secretary of Health, Education and Welfare (June, 1966).

We might indicate additional potential dangers adverted to by the expert witnesses. The provisions as constituted add another influence that promotes family instability, since potential husbands are discouraged from entering a family and risking an action against their property. Although the purported justification for the recovery obligation is one of economy, the net effect may be to increase the burden on the state by preventing former recipients from maintaining a position of self-support. The obligation to hand over tort recoveries to the state inhibits the recipient from bringing claims under the law that are freely pursued by non-recipients. Dr. Charles Grosser, a noted expert in Social Ser-

In sum, while I do not question the power of the State through appropriate regulation to recover public assistance expenditures, I would declare the statutory scheme with which we are presented in violation of the Fourteenth Amendment. The proper objective of conserving resources can be achieved by a more discriminating pattern. It is but a modest burden to impose if we require that the Department of Social Services tailor its regulations so that the guide is not the *mere availability of some property* but a genuine *ability to repay* without sacrificing the basic incidents of self-support. Such a course of decision would better serve our responsibility to secure individual liberty against purposeless restraint. At the same time, it in no way compromises Justice Brandeis' suggestion that "one of the happy incidents of the federal system [is] that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 311 (1932) (dissenting). Especially where the infirmity may be remedied without new legislation, our mandate to demand more precision from regulations that constrain liberty will challenge the ingenuity and inventive spirit of the states while ensuring fuller freedom for all the people.

Dated: New York, New York
February 29, 1968

/s/ IRVING R. KAUFMAN
United States Circuit Judge

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vices, tells us that these provisions operate in effect to leave recipients in continuous need of assistance, unable to get off the lists for long, because they are unable to retain a measure of self-support.

APPENDIX D

Statutes Involved

Cons. Laws New York Ann., Social Services Law

§104. Recovery from a person discovered to have property

1. A public welfare official may bring action or proceeding against a person discovered to have real or personal property, or against the estate or the executors, administrators and successors in interest of a person who dies leaving real or personal property, if such person, or any one for whose support he is or was liable, received assistance and care during the preceding ten years, and shall be entitled to recover up to the value of such property the cost of such assistance or care. Any public assistance or care received by such person shall constitute an implied contract. No claim of a public welfare official against the estate of the executors, administrators and successors in interest of a person who dies leaving real or personal property, shall be barred or defeated, in whole or in part, by any lack of sufficiency of liability on the part of such person during the period assistance and care were received.

Nor shall the claim asserted by a public welfare official against any person under this section be impaired, impeded, barred or defeated, in whole or in part, on the grounds that another person or persons may also have been liable to contribute.

In all claims of the public welfare official made under this section the public welfare official shall be deemed a preferred creditor.

2. No right of action shall accrue against an infant by reason of the assistance or care granted to him unless at the time it was granted the infant was possessed of money and property in excess of his reasonable requirements as described in section one hundred one. L.1940, c. 619, §10; amended L.1941, c. 82, §7; L.1953, c. 838; L.1961, c. 55; L.1963, c. 509; L.1964, c. 573, eff. April 16, 1964.

§104a. Liens for public assistance and care on claims and suits for personal injuries

1. If a recipient of public assistance and care shall have a right of action, suit, claim, counterclaim or demand against another on account of any personal injuries suffered by such recipient, then the public welfare official for the public welfare district providing such assistance and care shall have a lien for such amount as may be fixed by the public welfare official not exceeding, however, the total amount of such assistance and care furnished by such public welfare official on and after the date when such injuries were incurred.

The welfare commissioner shall endeavor to ascertain whether such person, firm or corporation alleged to be responsible for such injuries is insured with a liability insurance company, as the case may be, and the name thereof.

2. No such lien shall be effective, however, unless a written notice containing the name and address of the

injured recipient, the date and place of the accident, and the name of the person, firm or corporation alleged to be liable to the injured party for such injuries, together with a brief statement of the nature of the lien, the amount claimed and that a lien is claimed upon the said right of action, suit, claim, counterclaim or demand by the public welfare official be served prior to the payment of any moneys to such injured party, by registered mail upon such person, firm or corporation, and his, its or their attorney, if known, and upon any insurance carrier which has insured such person, firm or corporation against such liability. A copy of the notice of lien shall be mailed to such carrier at least twenty days prior to the date on which such carrier makes a payment to the injured party. Except as against such carrier, the effectiveness of the lien against any other party shall not be impaired by the failure to mail the required notice to such carrier. In addition, a true copy of such notice shall be served by regular mail to the welfare recipient and to his attorney, if known. Such mailing shall be deemed to be effective, notwithstanding any inaccuracy or omission, if the information contained therein shall be sufficient to enable those to whom the notice is given to identify the injured recipient and the occurrence upon which his claim for damages is based.

3. Upon the service of the notice, as aforesaid, the local public welfare official shall file a true copy thereof in the office of the clerk of the county in which his office is located, and, thereupon the lien of the public welfare official in the amount therein stated shall attach to any verdict, decision, decree, judgment, award or

final order in any suit, action or proceeding in any court or administrative tribunal of this state respecting such injuries, as well as the proceeds of any settlement thereof, and the proceeds of any settlement of any claim or demand respecting such injuries prior to suit or action.

4. An amended notice of lien may be served and filed by such public welfare official in the same manner and subject to the provisions of this section governing the notice of lien originally served and filed pursuant to this section.

5. Such lien may be enforced by action against those alleged to be liable for such injuries, as aforesaid, by the local public welfare official in any court of appropriate jurisdiction.

6. The aforesaid lien shall be valid and effective, when the notice thereof and the statement are served and filed as aforesaid, and shall continue until released and discharged by the local public welfare official by an instrument in writing and filed in the said county clerk's office, and no release, payment, discharge or satisfaction of any such claim, demand, right of action, suit or counterclaim shall be valid or effective against such lien.

7. The county clerk shall, at the expense of the county, provide a suitable book with proper index, to be called the public welfare lien docket, in which he shall enter the names of the public welfare official and the recipient, the date and place of the accident and the name or names of those alleged to be liable for such injuries, as aforesaid.

8. The provisions of this section to the contrary notwithstanding, the lien herein created shall be subject and subordinate to the lien on the amount recovered by verdict, report, decision, judgment, award or decree, settlement or compromise, of any attorney or attorneys retained by any such injured person to prosecute his claim for damages for personal injuries, having or acquiring by virtue of such retainer a lien on the cause of action of any such injured person, or on the verdict, report, decision, judgment, decree made in, or any settlement or compromise of, any such action or claim for damages for personal injuries.

9. The provisions of this section to the contrary notwithstanding, the lien herein created shall be subordinate to the lien of any hospital claimed under and to the extent recognized by section one hundred eighty-nine of the lien law, but only for treatment, care and maintenance given, prior to or in excess of the public assistance and care granted by the public welfare official.

10. The provisions of this section shall not be deemed to adversely affect the right of a public welfare official who has taken an assignment of the proceeds of any such right of action, suit, claim, counterclaim or demand, to recover under such assignment the total amount of assistance and care for which such assignment was made.

11. The provisions of this section to the contrary notwithstanding, the lien herein created shall not apply with respect to any claim or benefits payable to the recipients of any form of public assistance or care,

part of which is paid for by the government of the United States or any agency thereof when, in the opinion of the commissioner, such lien would jeopardize the continuation of such federal contribution.

12. The provisions of this section to the contrary notwithstanding, the public welfare official may in his discretion release to the injured person an amount not to exceed the cost of two years maintenance from the lien herein created.

This section shall not apply to any claim or award which is or may be allowed pursuant to the provisions of the workmen's compensation law or the volunteer firemen's benefit law. Added L.1964, c. 382; amended L.1965, c. 271, eff. July 1, 1965.

§105. Claim on insurance

If a person, who has received public assistance or care, shall die leaving insurance, and the estate of the assured is named as beneficiary, or no beneficiary is named, the public welfare official shall be entitled to a preferred claim to be paid out of such insurance to the amount of the cost of such assistance and care, and for funeral expenses not to exceed two hundred fifty dollars. If the insured leaves a widow or minor children who are, or are liable to become, public charges, the public welfare official may, in his discretion, waive his claim to such insurance or any part thereof to which he would otherwise be entitled. L.1940, c. 619, §10; amended L.1944, c. 688; L.1958, c. 772, §1, eff. July 1, 1958.

§360. Real property of legally responsible relatives; deeds and mortgages may be required

1. The ownership of real property by an applicant or applicants, recipient or recipients, who is or are legally responsible relatives of the child, children, minor or minors for whose benefit the application is made or the aid is granted, whether such ownership be individual or joint as tenants in common, tenants by the entirety, or joint tenants, shall not preclude the granting of aid to dependent children or the continuance thereof if he or they are without the necessary funds to maintain himself or themselves and such child, children, minor or minors. The public welfare official may, however, require, as a condition to the granting of aid or the continuance thereof, that he be given a deed of or a mortgage on such property in accordance with the provisions of section one hundred six.

2. However, while the property covered by the deed or mortgage is occupied, in whole or in part, by the responsible relative who gave such deed or mortgage to the public welfare official or, during his minority, by a child or minor for whose benefit the aid was granted the public welfare official shall not sell the property or assign or enforce the mortgage without the written consent of the department; and, when the property is occupied by such child or minor, such consent shall not be given unless it appears reasonably certain that the sale or other disposition of the property will not materially adversely affect the welfare of such child or minor during his minority.

3. The net amount recovered by the public welfare department from such property, less any expenditures approved by the department for the burial of the relative, the child or minor who dies while in receipt of aid under this title, shall be used to repay the public welfare district, the state and the federal government their proportionate share of the cost of aid to dependent children granted. The state and federal share shall be paid by the public welfare district to the state and the manner and amount of such payment shall be determined in accordance with the regulations of the department.

4. If any balance remains it shall belong to the estate of the legally responsible relative or relatives, and the public welfare district shall forthwith credit the same accordingly, and, provided they claim it within four years thereafter, pay it to the persons entitled thereto. If not so claimed within four years it shall be deemed abandoned property and be paid to the state comptroller pursuant to section thirteen hundred five of the abandoned property law.

5. The proceeds or moneys due the United States shall be paid or reported in such manner and at such times as the federal security agency or other authorized federal agency may direct. Added L.1951, c. 722; amended L.1959, c. 803, §3, eff. April 24, 1959.

Regulations of the New York State Department of Social Services

PART 368

Aid to the Aged, Blind or Disabled

* * * * *

368.2 *Determination of initial eligibility.*

(a) *General principles.*

Eligibility for AABD shall be determined for each applicant in accordance with the policies and procedures generally applicable in public assistance. This determination shall include consideration of each of the following factors of eligibility: financial need, residence within the State, living arrangements, assignment and transfer of property, ability of legally responsible relatives to contribute. The determination shall also include documentation of the factors of age, blindness or permanent and total disability where presumptively applicable. Where there is emergent need and a presumption of eligibility for assistance under the combined program, the preinvestigation grant procedure shall be followed. Where need is only for hospital care for a person not already in receipt of AABD, financial need shall be determined in accordance with standards applicable to hospital care only.

(b) *Financial need.*

(1) Financial need shall be determined in accordance with the standards of assistance established by the agency as required by rules of the board [Chapter I of this Title] and department regulations including the estimate of needs and the exploration, verification and utilization of resources. Financial need may be temporary or of indeterminate duration, partial or total, and may exist for a single item of assistance such as medical care only or for any needed com-

bination of items. Except for persons in higher education and training (Social Welfare Law, §321, subd. 2, par. [a]) when there are resources available to the applicant for assignment to the agency and when the public welfare official has required such assignment, refusal by the applicant to assign shall constitute ineligibility for public assistance.

• • • • •

PART 369

Aid to Dependent Children

• • • • •

369.2 *Determination of initial eligibility.*

[Additional statutory authority: Social Welfare Law, §355]

Eligibility for ADC shall be determined for each applicant in accordance with the policies and procedures generally applicable in public assistance. This determination shall include consideration of each of the following factors of eligibility: financial need, age, welfare of child or minor, residence within the State, living arrangements, relationship of child to relative, and deprivation of parental support or care. Where there is emergent need and a presumption of categorical eligibility the preinvestigation grant procedure shall be followed.

(a) *Financial need.*

Financial need shall be determined in accordance with approved standards of assistance. A public welfare official may in his discretion require the assignment of real property or other resources of an applicant or recipient who is a parent of the child or minor for whose benefit an ADC grant is made. Refusal by the applicant to assign shall constitute ineligibility for public assistance.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 191

GERALDINE SNELL, MIRIAM RAMOS and JUAN MALAVE, Individually and on Behalf of Their Minor Children, and on Behalf of All Other Parents of Needy, Dependent Children, and ROBERT WHALEY, and HELEN MARLEY, Individually and on Behalf of All Others Similarly Situated,

Appellants,

GEORGE K. WYMAN, as Commissioner, New York State Department of Social Services; MITCHELL GINSBERG, as Commissioner, New York City Department of Social Services,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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IN THE

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No. 191

GERALDINE SNELL, MIRIAM RAMOS and JUAN MALAVE, Individually and on Behalf of Their Minor Children, and on Behalf of All Other Parents of Needy, Dependent Children, and ROBERT WHALEY, and HELEN MARLEY, Individually and on Behalf of All Others Similarly Situated,

Appellants,

GEORGE K. WYMAN, as Commissioner, New York State Department of Social Services; MITCHELL GINSBERG, as Commissioner, New York City Department of Social Services,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

The appellants have appealed from a judgment of the United States District Court for the Southern District of New York. The three-judge Court (one judge dissenting) dismissed appellants' suit for a declaratory judgment and injunctive relief, seeking to invalidate and restrain enforcement of certain statutes and regulations which impose repayment obligations upon welfare or relief recipients of cash assistance in New York State.

The appellee Mitchell Ginsberg moves to affirm the appeal on the ground that the questions presented are so insubstantial as not to need further argument.

Statement

This is a direct appeal from a judgment entered on March 16, 1968, by a district court of three judges convened pursuant to 28 U.S.C. § 2281, dismissing the complaint which sought a declaratory judgment and injunctive relief restraining enforcement of certain New York statutes and regulations which impose repayment obligations upon recipients of welfare relief payments.

ARGUMENT

The questions raised by the appellants lack substantiality. The statutory provisions authorizing public welfare officials in New York to recover payments made to welfare recipients where they are discovered to have property, to obtain liens on claims and suits for personal injuries of such recipients, to be reimbursed from insurance on the life of the recipient and to be given a deed or mortgage on real property of a recipient are not in conflict with any federal law and not violative of any constitutional provision.

(1)

The basic theme of the appellants' argument is that the provisions for recovery of moneys from welfare recipients in the New York statutes are inconsistent with good social welfare considerations. Realizing that the wisdom of social legislation is normally a matter for legislative determination, the appellants attempt to raise what they regard as proper social welfare practices to the level of constitutional rights.

Even at the constitutional level the appellants find it necessary to seek a preferred status. They urge that the cases which deal with "economic due process" should not be treated as applicable. They seek not only to have the making of payments to those on the welfare roll transformed into a fundamental constitutional right but to substitute for the usual standards for determining whether State social legislation is valid a new standard based on the views of social work experts.

While the dissenting judge in the court below did not adopt this argument fully, he found it necessary to rest his dissent on bases which depart from normal constitutional standards. He would have invalidated the New York statute because of "the inelegance of the scheme designed, the ease of correcting it by more discriminating methods" and because of "the insubstantiality of the interest served" (Juris. Statement, p. 45). The last quoted phrase undoubtedly refers to the fact that recoveries from welfare recipients amount to approximately $5,000,000 while State welfare expenditures exceed a billion dollars.

To support the application of these unusual constitutional standards he found it necessary to treat the recoveries from welfare recipients as an interference with a fundamental aspect of freedom. Nevertheless, he conceded that a state may legitimately attempt to conserve its resources by imposing some obligation to repay on persons who receive public assistance. He indicated that he would regard a recovery statute as constitutional if it would "exempt a modest interest in real property or insurance and at least some part of the damages recovered for personal injury" (*Ibid.*, p. 46).

This approach of the dissenting judge is plainly that of a thoughtful legislator; it is not, however, the application of standards used in determining the constitutionality of statutes.

It may be that a recovery statute which conformed with the standards of the dissenting judge or those of the social work experts relied on by the appellants would result in more relief recipients ultimately escaping from or keeping themselves from returning to the welfare rolls. Similarly, we might ultimately have fewer indigents if the test for welfare relief eligibility were higher or lower; if earnings by relief recipients were not treated as a basis for reducing welfare payments; or if a guaranteed annual wage were provided instead of the present welfare payments. These are questions, however, of legislative judgment, not constitutional issues.

(2)

It is not arbitrary or capricious to require that those who are supported by the State shall make repayment when they obtain financial windfalls. It is not unreasonable for the State to condition its grant of aid on such reimbursement.

There is no irrationality in a requirement that a relief recipients who recovers damages in a personal injury case must, after retaining a two-year budget allowance for himself, repay the State out of the balance of the proceeds of his judgment or settlement. It is suggested by the appellants that, as a result of reimbursing the State, the person may return to the relief rolls. Certainly this is a real likelihood in a situation where the injury is a disabling one. A person who could not earn a living prior to the disability is not likely to be able to do so after such an injury. A reimbursement requirement, however, is not unconstitutional merely because of such a possibility. The logic of appellants' arguments in this respect, carried to an extreme, would mean that a person who fraudulently concealed assets in order to obtain relief could not be required to make reimbursement where there was a likelihood that doing so might result in his ultimately requiring welfare relief.

Nor is it unreasonable for the State to reimburse itself from life insurance paid on the death of a welfare recipient. This is, in effect, a part of his estate. There is no real difference between such insurance and any other property or moneys in his estate.

It is difficult to conceive the rationale of an argument that would treat as arbitrary and capricious a requirement that one who owns real property at the time he seeks or obtains relief payments must deed or mortgage the property to the State as security for repayment out of the proceeds of the ultimate sale of the property. The State could refuse to grant relief payments until the real property were sold and its proceeds exhausted in providing living expenses. Instead it permits the recipient to obtain relief payments and retain the property. In return for this benefit it insists on the real property being pledged to it.

We turn now to the specific constitutional arguments of the appellants:

a. The Supremacy Clause.

The appellants make this argument on the theory that the New York repayment provisions are in conflict with federal legislation. They do not, however, point to any provision of federal law which, directly or indirectly, bars such state statutes. They rely instead on the provisions of federal law authorizing appropriations by the federal government to aid states which grant relief payments (e.g. 42 U.S.C. §§ 601, 1351). These provisions merely state that the appropriations are to enable the states to furnish financial assistance to help recipients "attain or retain" capability of self-support. Surely these federal provisions do not bar the New York provisions for reimbursement out of property already owned or moneys acquired in the nature of windfalls. The New York statutes and the federal appropriation provisions are not

in such direct conflict that they cannot be reconciled or consistently stand together. *Kelly* v. *Washington*, 302 U. S. 1, 10 (1937). It would seem that they are not in conflict at all.

b. Equal Protection.

Much of the argument by the appellants with regard to equal protection borders on the absurd. For example, it is urged that the State reimbursement provisions deny equal protection to the poor because tax laws permit oil depletion allowances and other laws, undoubtedly federal, grant transportation and farm subsidies to the affluent.

The appellants also point to the provision in the federal "medicaid" law restricting reimbursement provisions in a state plan for such medical assistance. 42 U.S.C. § 1396a (a), (18). It is unnecessary to discuss the question whether a federal law dealing with one aspect of welfare can result in a state statute dealing with another aspect becoming an unconstitutional denial of equal protection. It is sufficient to point out that a legislative body could have reasonable grounds for treating the assistance given to the "medically indigent" in a manner differing from that provided for payments granted to the general run of indigents.

c. Due Process.

In part the due process argument of the appellants appears to come down to a contention that the property rights of the indigent are superior to, and are entitled to greater constitutional protection than, those of other citizens. Another element of their argument amounts to a contention that due process is violated whenever there is a basis for urging that a provision in a welfare law may deter a person from seeking such assistance or may prevent a woman from retaining assets which, if retained, would help her in obtaining a husband.

It is even urged that due process bars a reimbursement provision whenever assets "could be put to better use" by the welfare recipient (Juris. Statement, p. 12). In essence, the argument is that due process is violated because, absent the State reimbursement provisions, one of the appellants might have used the money to set up a business, another could have established a reserve for burial purposes, and the others could have used the money for education of their children.

All of these are worthy purposes. A legislature may consider them in designing its legislation, but a refusal by a legislature to make provision for such exceptions in adopting reimbursement laws does not constitute a violation of due process.

CONCLUSION

The judgment of the District Court should be affirmed.

July 23, 1968.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1968

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GERALDINE SNELL, et al.,

Appellants,

against

GEORGE K. WYMAN, as Commissioner, New York State Department of Social Services; MITCHELL GINSBERG, as Commissioner of New York City Department of Social Services,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM BY APPELLEE GEORGE K. WYMAN, AS COMMISSIONER, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES

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IN THE

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OCTOBER TERM, 1968

No. 191

GERALDINE SNELL, et al.,

Appellants,

against

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM BY APPELLEE GEORGE K. WYMAN, AS COMMISSIONER, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES

Appellee George K. Wyman, as Commissioner of the New York State Department of Social Services, moves pursuant to Rule 16 of the Revised Rules of this Court, that the judgment of the United States District Court for the Southern District of New York be affirmed or, in the alternative, that this appeal be dismissed.

Opinions Below

The endorsement memorandum of the Hon. Marvin E. Frankel, District Judge, granting plaintiffs' motion to convene a three-judge District Court, is not reported. The *opinion of the District Court for the Southern District of* New York is reported at 281 F. Supp. 853. The opinion of the District Court and the dissenting opinion of Judge Kaufman are set forth on pages 14 through 53 of appellants' jurisdictional statement (App. B.).

Jurisdiction

Appellants invoke the jurisdiction of this Court under 28 U.S.C. Section 1253.

Statutes and Regulations Involved

New York Social Welfare Law §§ 104, 104a, 105 and 360 (appellants' appendix D), and Title 18, Sections 368.2 and 369.2, of the Regulations of the New York State Department of Social Services (appellants' appendix D).

Questions Presented

1. Whether the New York State recovery provisions conflict with the Federal Social Security Act, 42 U.S.C. §§ 601 and 1351, and thus violate the Supremacy Clause of Article VI of the United States Constitution?

2. Whether the recovery provisions violate the Equal Protection Clause of the Fourteenth Amendment?

3. Whether the recovery provisions violate the Due Process Clause of the Fourteenth Amendment?

Statement of the Case

New York's recovery statutes require recipients of public assistance who have financial resources to reimburse the State for benefits received. The determination of the Legislature to recover public assistance expenditures from recipients having assets other than earnings is an attempt to fulfill the State's obligations to those in financial need, while utilizing its resources solely on the basis of such need* (Wyman deposition, p. 15; Ginsberg deposition, p. 11).

In enforcing the recovery provisions, there is never under any circumstances an attachment or assignment of salary or earnings, since the definition of property under the statute is interpreted to exclude earnings of any kind, as well as assets acquired from earnings (Wyman deposition, p. 25; Felder deposition, pp. 15-16).

Assignments of assets by recipients are limited to those presently held, or presently assignable; there is no assignment of property to be acquired in the future (Felder deposition, pp. 18-19). Of course, all such assignments are effective only to the extent of public monies disbursed.**

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* *Extra* grants in aid (over and above the basic allowances) cost $10-million to $12-million per month in New York City alone. There, the basic allowance for a family of four is $272.50 a month. The New York Times, July 15, 1968, p. 1, col. 5 (story by Peter Kihss). Recent statistics of the New York City Department of Social Services (as of April, 1968) indicate that there are 841,542 people on the welfare rolls in New York City alone—10.8% of that City's population. The trend is upward. Experts estimate that one or two million persons will join the welfare rolls (nation-wide) in the coming year. *The New York Times,* loc. cit. *supra.*

** Appellants' assertion (jurisdictional statement, p. 4) that maintenance of bank accounts will subject recipients to fraud penalties, and that the State will seek recovery in such situations even from estates otherwise payable to surviving minor children, is mistaken. Only secret bank accounts are fraudulent, and lead to the dire consequences so graphically depicted by appellants.

Funds acquired by recipients through personal injury claims or actions are subject to a lien for the amount of assistance funds disbursed *subsequent* to the injury, but prior to recovery of compensation. Even then, however, there is deducted from the amount of the lien (and thus released to the recipient) a sum equal to the recipient's living expenses for two years. In addition, all future medical bills are paid by the Department of Social Services (Ginsberg deposition, p. 31). Thus, if the injury is minor, the recipient may return to work, and his earnings are exempt. If the injury is major, the amount of the State's recovery will be a relatively small portion of the total.

Windfalls such as inheritances or lottery winnings must be assigned when received, as a condition to *continued* public assistance (Ginsberg deposition, p. 10).* Insurance proceeds are subject to recovery only if the recipient has named his estate as beneficiary, or has named no beneficiary. See N. Y. Social Services Law, § 105. Assets in a recipient's estate are also subject to recovery, except for the portion covered by the widow's and minor children's exemptions under the Estates, Powers and Trusts Law (§ 5-3.1). It must be repeated, however, that insurance or estate assets acquired by earnings from employment after the cessation of public assistance payments are not subject to reimbursement. Real estate will be covered by a mortgage. However, such a mortgage cannot be enforced if minor children might be adversely affected. N. Y. Social Services Law, § 360.

In any event, refusal by an applicant to assign assets to the State does not necessarily bar him from financial assistance. Factors such as the ability of the person to understand the consequences of his refusal; the applicant's

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* Contrary to appellants' assertion (Juris. Statement, p. 5), there is a consistent policy of setting aside money to be used for the future education of the recipient's children (Ginsberg deposition, p. 28).

health; the welfare of minor children; and the value of the assets involved, are all taken into consideration (Felder deposition, p. 7).

Shortly after appellants commenced this action, a three-judge District Court was convened, depositions were taken, and the case was submitted to the Court on agreed facts. Judges Frankel and Metzner voted to dismiss the complaint, while Judge Kaufman dissented. The majority opinion held* that the recovery provisions served a valid state purpose.

No Substantial Federal Question is Presented Requiring Full Hearing Before This Court

I. The challenged recovery provisions do not violate the supremacy chause, since they do not conflict with the Federal Social Security Act, and indeed, are at least implicitly authorized by Federal law.

Appellants argue (Juris. Statement, pp. 7-9) that the recovery provisions of the New York Social Services Law (§§ 104, 104a, 105 and 360), and the regulations of the New York State Department of Social Services adopted pursuant to the New York statutes, conflict with the Federal Social Security Act (42 U.S.C. §§ 601 *et seq.* and §§ 1351 *et seq.*), and are therefore invalid. The contention is plainly without arguable merit. Far from presenting a conflict, New York's statutes are at least implicitly authorized by the Federal statutes, which provide that if the states do receive reimbursement of public assistance monies (portions of which were provided by the Federal Government in the first instance), the United States must

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* The Court initially dismissed the contention that this was a class action [Juris. Statement, p. 26]. The dissenting judge did not dissent from such disposition and no point is made of this by appellants upon the appeal.

receive its pro rata share of such reimbursement (42 U.S.C. §§ 303, 603, 1203 and 1353).*

The thrust of appellants' argument is to distort the general policy of the Federal (and indeed the State) legislation, which aims toward the objective of eventual rehabilitation and the motivation of the recipient to that end, by narrowing its applicability to the recovery provisions, which are an incidental, though legitimate aspect of the legislation. The Federal legislation does not establish a policy with respect to the advisability or wisdom of reimbursement by public assistance recipients with assets. No flight of imagination can read into the Social Security Act any right to be insulated from repayment out of windfalls. Appellants simply advance vague allegations and theories concerning an alleged deleterious effect on motivation resulting from the obligation to repay out of *presently held* (or *presently assignable*) resources. But obviously there cannot be any effect on motivation, when the recovery provisions have no application to earnings, or to assets acquired from future earnings (Wyman deposition, p. 25; Ginsberg deposition, pp. 26, 31). Moreover, motivation is an individual matter, and it is arguable that some public assistance recipients might feel a greater sense of dignity and self-respect because they consider such payments as a loan which they will repay if they are possessed of assets, rather than as a "dole" or as charity (Wyman deposition, pp. 15-16).

There is no analogy between the instant case and that of *Thompson* v. *Shapiro,* 270 F. Supp. 331 (D. Conn. 1967), prob, juris. noted sub nom. *Shapiro* v. *Thompson,* 389 U. S. 1032, returned to calendar for reargument [36 U.S.L.W. 3345 (June 17, 1968)] where a state policy re-

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* In this connection it should be pointed out that the dissenting judge found no conflict with federal law. Indeed, he expressed several times his agreement that New York has the authority to require reimbursement (App. B., pp. 44, 46-47).

quiring prior residence was held to violate the established federal right to travel, as clearly defined in *Edwards* v. *California,* 314 U. S. 160 (1941). The legislative history cited by appellants (juris. statement, p. 8) does not aid their arguments, since it is merely indicated therein that Congress contemplated fraud situations as an example of the instances in which recovery might be appropriate. Nor do cases such as *City of Worcester* v. *Quinn,* 304 Mass. 276, 23 N. E. 2d 463 (1939); *Charlestown* v. *Hubbard,* 9 N. H. 195 (1938); *City of Albany* v. *McNamara,* 117 N. Y. 168 (1889); and *Guardians of Pontypridd Union* v. *Drew,* 1 K. B. 214 (1927), holding that there is no common-law right to reimbursement of public assistance monies, aid the appellants. We are dealing here with a *statute* providing for such reimbursement, and appellants' argument should be addressed thereto. Moreover, the cases dealing with the lack of common-law right to reimbursement at least imply that a statute providing therefor would be valid. See e.g., *Guardians of Pontnypridd Union* v. *Drew, supra,* 1 K. B. 214, 216-217 (1927).

The recovery provisions are simply a means of ensuring that public assistance funds are disbursed only to those in need. This is a proper area for State regulation, consistent with the Federal statutes. See *King* v. *Smith,* 36 U.S.L.W. 4703, 4706 (decided June 17, 1968), where this Court said:

> "There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need * * *."

II. New York's recovery provisions do not violate the Fourteenth Amendment's guarantee of equal protection of the laws.

Appellants' argument that New York's recovery provisions violate the equal protection clause is totally without

merit. To succeed in their argument, appellants must demonstrate either (1) that the operation of these laws differs among members of the class defined by the Legislature, or (2) that the classifications drawn are unreasonable in the light of their purpose. Further, the legislation will not be measured against the standards of appellants' personal opinions. The classifications are valid if they are practical, and they are not reviewable unless palpably arbitrary. The test is whether the classifications are rational. *Morey* v. *Doud*, 354 U. S. 457, 463-4 (1957).

Viewed in the light of these fundamental principles, appellants' arguments are untenable. They begin (juris. statement, pp. 9-10) by condemning the "singling out" of welfare recipients for the imposition of reimbursement obligations, as opposed to the "gratis" distribution of public largesse to others by way of oil depletion allowances, etc. However, this argument is really addressed to the wisdom of the challenged legislative action, not to the basis for the equal protection challenge.

Similarly, the argument that "Medicaid" (N. Y. Social Services Law §§ 363 *et seq.*), recipients are treated differently fails to reach the underlying basis for the classification. "Medicaid" is essentially a device for preventing a specific type of expense (i.e., medical), from becoming so catastrophic in its effect that it renders a family destitute. Welfare payments, on the other hand, provide subsistence to persons who are already destitute, for all practical purposes (Wyman deposition, pp. 23-24; Ginsberg deposition, p. 16). To state the classification is to demonstrate its reasonable basis.

Finally, appellants profess to see an "arbitrary" classification in the exemption of claims for workmen's compensation and volunteer firemen's benefits from the recovery provisions relating to personal injury claims (N. Y. Social Welfare Law § 104). Here too, however, New York's Leg-

islature has acted reasonably.* Workmen's compensation claims are exempt from execution for debt (N. Y. Workmen's Compensation Law § 33), while no such exemption applies to personal injury claims generally. Further, workmen's compensation payments are small and periodical in nature, and do not include compensation for pain and suffering (as is often the case with personal injury claims). Volunteer firemen's benefits are designed to encourage public service rendered without pay. See *Bauman* v. *Town of Irondequoit,* 204 Misc. 494 (Sup. Ct. 1953), affd. 282 App. Div. 916, affd. 307 N. Y. 926 (1954).

Appellants cite *Collins* v. *State Board of Social Welfare,* 248 Iowa 369, 81 N. W. 2d 4 (1957), and *Department of Mental Hygiene* v. *Kirchner,* 60 Cal. 2d 716, 388 P. 2d 720 (1964), remanded for further proceedings 380 U. S. 194 (1964), reiterated on state constitutional grounds 62 Cal. 2d 586, 400 P. 2d 321, as "applying the equal protection principle in welfare situations." Neither of these cases has any application to this case. In *Kirchner,* the court dealt with recovery from relatives of the expense of maintaining an involuntarily committed mental patient. Here, we are dealing with a reasonable condition imposed directly upon the voluntary recipient of public assistance. In *Collins,* the court found that the Iowa legislature had discriminated within a class by placing a specific monetary limit on aid without regard to need. Here, it is apparent that the Legislature has achieved equality within the class of public assistance recipients by ensuring that welfare payments will be made only to those in need.

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* The Legislature has also exempted workmen's compensation claims from the statutory lien imposed upon personal injury claims, in favor of charitable and municipal hospitals. N. Y. Lien Law, § 189, subd. 6.

III. The recovery provisions do not violate the due process clause of the Fourteenth Amendment.

In a final attempt to create a constitutional issue out of their disagreement with New York's Legislature, appellants claim that the recovery provisions unreasonably deprive them of property in the traditional sense (by requiring assignments); deprive "recipients who are deterred from applying"* (sic) of property rights in the cash benefits themselves; and deprive recipients of the freedom "to become independent and self-supporting." This due process contention, too, is plainly frivolous. Appellants cannot seriously contend that the State is powerless to take into consideration the resources specified in the Act, acquired by recipients while obtaining welfare benefits. Actually, appellants epitomize their entire argument in this case by stating that "the assets assigned could be put to better use." Appellants' grievance is plainly misdirected. The judgment as to the wisdom of the recovery provisions is for the Legislature. It may be, as the dissenting judge pointed out, that the recovery provisions are "inelegant" (App. B, p. 45). But, as the majority opinion said (App. B, p. 29):

> "The plain flaw that none the less destroys plaintiffs' thesis is that it is brought to the wrong forum."

The legislative determination certainly meets the constitutional test of at least "minimal rationality," see *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955); *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 47-48 (1966), and appellants' arguments do not present a substantial constitutional issue.

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* Who are neither named nor joined as parties to this action.

CONCLUSION

For the foregoing reasons, the within motion to dismiss or affirm should be granted.

Dated: New York, New York, July 24, 1968.

Respectfully submitted,

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No. 191

In the Supreme Court of the United States

OCTOBER TERM, 1968

GERALDINE SNELL, ET AL., APPELLANTS

v.

GEORGE K. WYMAN, AS COMMISSIONER, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; MITCHELL GINSBERG, AS COMMISSIONER OF NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order of October 14, 1968, inviting the Solicitor General to express the views of the United States with respect to this case.

OPINION BELOW

The opinion of the three judge district court is reported at 281 F. Supp. 853.

JURISDICTION

By their complaint, appellants sought injunctive and declaratory relief against the operation of New York State welfare laws and regulations on federal

constitutional grounds. A three-judge district court was convened as required by 28 U.S.C. 2281, and entered its judgment dismissing the complaint on March 15, 1968. The notice of appeal was filed on April 11, 1968. Appellants invoke the jurisdiction of this Court under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether New York State provisions authorizing recovery of benefits paid to welfare recipients in specified circumstances are invalid because of conflict with the relevant portions of the federal Social Security Act or the Due Process or Equal Protection clauses of the Fourteenth Amendment to the Constitution.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of New York State law are set out in the Appendix to the Jurisdictional Statement (App. D). The relevant provisions of the Social Security Act and regulations thereunder are set out in the Appendix to this brief, *infra*.

STATEMENT

As the district court opinion shows (J.S. App. 14–22, 281 F. Supp. 853–869), appellant Snell applied in February, 1967, for benefits under the New York State program of Aid to Families with Dependent Children (AFDC). In order to qualify, she was required to give New York welfare officials a "Pledge Agreement" and "Assignment of Proceeds of Sale" relating to a $900 share which she held in the cooperative apartment where she and her children lived.

These instruments purport to secure her repayment of the cost of the public assistance she subsequently received; however, the mortgage may not be enforced or assigned except under specified circumstances.

Appellant Ramos has been receiving AFDC benefits since 1963. In 1967, after she and her eldest child were injured in an automobile accident, she was required to assign the proceeds of their personal injury claims to the Department of Social Services as a condition to her continued receipt of public assistance. The assignment entitled the State to recover a sum equal to the benefits paid to her since the date of the accident, but not benefits paid before that date. Appellants Malave and Whaley each sought welfare assistance, under AFDC and the Aid to the Permanently and Totally Disabled (APTD) programs, respectively, after suffering accidents. With respect to each, the State has sought recovery, to the extent of benefits paid, from payments received or claimed in compensation for the injury.

Between 1945 and 1954, appellant Marley received welfare benefits under a State-financed public assistance program. At that time, she assigned the proceeds of an insurance policy on her life to the Department of Social Services. With the help of a cousin, she finished paying premiums on this policy in 1967. Because of the prior assignment, however, the insurance company refuses to pay the cash value of the policy to her.

Appellants filed their complaint in the form of a class action, Fed. R. Civ. P. 23, seeking an adjudication that the New York State statutes and supporting

regulations which authorized these assignments and liens were invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution, and as inconsistent with the purposes and provisions of the federal Social Security Act, 42 U.S.C. 301, *et seq.* This latter claim is grounded in the federal financing and coordination of the AFDC and APTD programs under that Act, and thus is not available to appellant Marley, who received benefits under a State program (J.S. 5).

Because of the "small record" and apparent doubts as to whether appellants adequately represented the class, the majority of the district court refused to treat the action as a class suit (J.S. App. 44, n. 27; 281 F. Supp. at 869). The court ruled that, since the State did not seek recovery from wages or salaries earned after a welfare recipient had gone off relief, or from assets acquired with such earnings, "none of the provisions plaintiffs attack have any deterrent or discouraging effect upon the incentives of welfare recipients to improve their lot by seeking and engaging in productive employment" (J.S. App. 25–26; 281 F. Supp. at 860). The majority concluded that appellants' contentions were lacking in merit, and dismissed the complaint.

Judge Kaufman, dissenting, found a lack of "adequate precision" in the recovery provisions, which, in his view, gave offense to the Fourteenth Amendment (J.S. App. 45; 281 F. Supp. at 870). He asserted that the Constitution requires "the Department of Social Services [to] tailor its regulations so that the guide is not the *mere availability of some property* but a

genuine *ability to repay* without sacrificing the basic incidents of self-support." (J.S. App. 53; 281 F. Supp. at 873.) In requiring the citizen to sacrifice those "basic incidents," he urged, the State unlawfully deprives him of his liberty and his equality.

DISCUSSION

1. The federal interest in this litigation is essentially limited to the Supremacy Clause aspect of appellants' claims, that is, whether the provisions or policies of federal legislation foreclose the recovery of welfare benefits from recipients in circumstances such as are presented here. Appellants concede that both of the relevant titles recognize at least some forms of recovery in providing that each State's periodic grant is to be "reduced by a sum equivalent to the pro rata share to which the United States is equitably entitled * * * of the net amount recovered during any prior quarter by the State * * *." 42 U.S.C. 603(b)(2) (AFDC), 1353(b)(2) (APTD). They argue, however, that (1) the legislative history of the provision and (2) overall statutory policy demonstrate that recovery must be limited to such situations as fraud and overpayment, and that Congress never intended that a State might treat its welfare system as giving loans rather than charity.

A. Contrary to appellants' claims, the relevant legislative history does not support their Supremacy Clause argument. Although "recovery" is not defined by statute, and none of the few explanatory examples of "recovery" mentioned in the legislative history resemble the recoveries at issue in this case, established State practices and provisions of recent

federal medical assistance programs suggest congressional acceptance of recoveries such as appellants complain of here.

The Social Security Act as first enacted required State plans for old-age assistance to provide for federal sharing of any recoveries made from the estates of recipients; the legislative history of this provision mentioned as an "example" of a situation in which recoveries might be made, cases where "persons had been defrauding the State." H. Rep. No. 615, 74th Cong., 1st Sess. 17 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 29 (1935). Like its successors, the statute itself neither required recoveries nor specified what sort of recoveries might be made; it simply required State governments to share with the federal government any recovery made.

The present language, embodied in provisions enacted as part of the omnibus Social Security Act Amendments of 1939, was intended to simplify the recovery procedure and to broaden the federal recovery provision to apply to all three then-existing assistance programs—Old Age Assistance, Aid for Dependent Children, and Aid to the Blind. In the detailed discussion of these amendments, new examples of possible recovery situations were given—"recoveries from the estates of recipients, payments under mistake, etc." H. Rep. No. 728, 76th Cong., 1st Sess. 33 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 40, 41 (1936)—thus indicating that the reference to "fraud" in the 1935 history was not exhaustive. Perhaps as significant is that the general discussion of the amendments in the House and Senate reports

is presented together with the discussion of two other amendments, which were described as being intended to further clarify the "purpose of all three assistance programs": one inserted the word "needy" into the definition of those eligible for assistance; and the other imposed on the States a duty to consider an applicant's "other income and resources" in determining assistance. H. Rep. No. 728, 29; S. Rep. No. 734, 30–31. All three amendments were minor in relation to the whole of the act, so that the drawing of inferences is perhaps risky; but the soundest inference from this history is that Congress acquiesced in a view of benefits more consistent with broad-scale recovery than contrary to it. . . . .

Subsequent events support this inference. As pointed out in the district court opinion, there is and for a long time has been a "wide prevalence among the States of statutes like those in question" (J.S. App. 42; 281 F. Supp. at 868), which has occasioned neither congressional nor administrative disapproval. We are informed by the Chief of the State Grants Branch in the Social and Rehabilitation Service of the Department of Health, Education, and Welfare that the Federal share of repayments of assistance in fiscal year 1968 was $14,574,497.[1] Indeed, in the recently enacted programs providing medical assistance for the aged (1960) and Medicaid (1965), Congress inserted specific provisions, limited to medical assistance, requiring a qualifying State plan to provide that "no

[1] Excluding refunds of assistance erroneously paid, uncashed checks, etc.

lien may be imposed against the property of any individual prior to his death on account of medical assistance * * * and that there shall be no adjustment or recovery (except [in specified circumstances]) of any medical assistance * * * correctly paid on behalf of such individual under the plan * * *." 42 U.S.C. 302(a)(11)(E), 1382(a)(15)(D); 42 U.S.C. 1396a(a)(18) (Supp. III).[2] These provisions, apparently recognizing that such liens are regularly imposed under other assistance programs, prohibit them for medical assistance programs only. See also S. Rep. No. 1856, 86th Cong., 2d Sess., 108–109 (1960); H. Rep. No. 213, 89th Cong., 1st Sess., 69–70 (1965); S. Rep. No. 404, 89th Cong., 1st Sess., 80 (1965).

B. The basis for appellants' argument that the New York provisions are invalid because they are contrary to the "purpose" of the federal programs is, we submit, inadequately developed on this record. The challenge is necessarily limited by the finding of the court below that, in view of the authoritative limitation of the State recovery provisions by State regulation and the limited facts alleged in the complaint, this case does not present the issue whether recovery may be had from wages or assets earned subsequent to the period during which welfare assistance was provided.[3] Whether or not recovery from wages or

[2] 42 U.S.C. 1396a(a)(25) (Supp. III) not only recognizes but specifically requires recovery of the cost of medical assistance from third parties legally liable to bear it—for example, tortfeasors.

[3] On the facts here, the question presented is even more limited. Only appellant Ramos was receiving welfare benefits prior to the time she acquired the "asset" from which New York

earned assets might be found to frustrate the stated congressional purpose of assisting efforts toward self-support and independence, the question here is quite different. Here, each lien or assignment relates to an asset or claim possessed by the individual concerned at a time when he wished to commence or continue to receive welfare benefits; each was effective only to the extent of benefits subsequently received. Thus, the only disincentive which can fairly be claimed is one relating to *application* for welfare benefits—that people may be reluctant to seek or continue on welfare if it means giving up assets or claims which they possess.

Whether such a disincentive is contrary or unrelated to the federal scheme is in our view quite doubtful. A limitation of welfare to those truly without assets would not appear either irrational or inconsistent with what Congress has done.[4] Cf. *King* v. *Smith*, 392 U.S. 309, 318. Equally important to the disposition of this case, in our view is the fact that this issue was not fully developed below. The district court's refusal to consider this suit a class action appears to reflect the same view.

An example of the inadequacies of this record is found in the question whether the statutory scheme or

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seeks to recover. New York is asserting no right to recover the cost of those prior benefit payments from her claim. Thus, the case of a recovery from an after-acquired asset, even one of windfall nature, is not presented here.

[4] In connection with the AFDC program, Congress has very recently required that certain *income* of dependent children be disregarded in the calculation of benefits, 42 U.S.C. 602(a)(8), as amended (Supp. III).

the Constitution requires the States to leave the citizen a reserve of "basic incidents of self-support" (J.S. App. 53, 281 F. Supp. at 873), an issue stressed in Judge Kaufman's dissent. Judge Kaufman's argument was that such a requirement does exist, and that the New York provisions are invalid under the Due Process clause for failure to accommodate it. In fact, there exist federal regulations governing this question of allowable reserve. They relate, not to "recoveries," but to determining the eligibility of welfare applicants for benefits. As already mentioned, the statute requires that in making this determination the States must consider applicants' "other income and resources." 42 U.S.C. 602(a)(7), 1352(a)(8). The regulations govern what must, what may, and what must not be so considered. In effect, they permit a State to create a reserve as part of its plan, but do not require it to do so. Applicants' homes, for example, could not be considered a "resource" if designated as part of such a reserve; if not so designated, the regulations require the State to consider an applicant's home as a resource, which he might therefore have to sell before qualifying for benefits. Need-Requirements for State Assistance Plans, 33 Fed. Reg. 10230 ff., Paras. 3 (A), (B)(1), (C)(1). The regulations also specify that assets not currently available—for example, a personal injury claim—may *not* be considered current resources, and thus may not be

used to determine benefit eligibility or level.[5] (Para. 3(C)(2)(iii).)

While these regulations exist in the context of broad State discretion "to set [their] own standard of need and to determine the level of benefits * * *," *King* v. *Smith*, 392 U.S. 309, 318, it could be argued that it is inconsistent to treat a home as part of a "reserve" for the purpose of determining current benefit levels and yet require that home to be mortgaged to the State on a promise to repay the benefits thus calculated; or to say that a claim which may not currently be considered a resource may nonetheless be attached by the State to compensate it for the benefits it therefore pays. But these questions were never developed below. It does not appear, for example, whether or not homes are designated as part of an allowable reserve under the New York plan. The question of consistency between the federal requirement that claims as uncertain as injury claims not be considered "resources" and the State's claim of right to premise present payment of benefits upon an assignment of such a claim was never explored. This Court recognized in *King, supra,* 392 U.S. at 317, 322, that the Supremacy Clause argument must be based on a State rule's contravention of one of the requirements which the federal statute imposes on State plans and makes enforceable by the Secretary of the Department of Health, Education, and Welfare, who is required to

[5] Once actual payments on such a claim were received, they would be considered cash in hand, which *must* be taken into account in determining present eligibility and benefit level. Para. 3(C)(2)(i).

approve any State plan which he finds meets the federal requirements. 42 U.S.C. 602(b), 1352(b). Appellants do not suggest that any of these specific federal standards are contravened by the New York provisions.[6]

2. The government has no immediate interest in the Due Process and Equal Protection claims here raised. We point out, however, that the deficiencies in the record respecting the factual background against which these claims must be considered are no less than with respect to the Supremacy Clause claim discussed here. Particularly in view of the existence and general enforcement of an implicit federal standard which requires consideration of the same matters as would bear on the constitutional claims, n. 6, the failure to develop the statutory Supremacy Clause aspect of the case could itself justify a refusal to give the constitutional issues plenary consideration.

It is also our belief that rejection of the constitutional claims in the particular context of this case would not affect the questions raised in *Shapiro* v. *Thompson*, *Washington* v. *Legrant*, and *Reynolds* v. *Smith*, Nos. 9, 33, and 34, this Term. For the reasons already stated, we believe the particular State actions

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[6] The federal agencies charged with enforcement of the federal standards have consistently inferred an unexpressed standard into each assistance program under the Act—that a State plan may not embody unreasonable classifications unrelated to the purposes of the Act. We are informed by the Department of Health, Education, and Welfare that in view of the legislative provision for recoveries and the background of that provision, no State plan recovery provision has ever been found to violate this implicit standard.

at issue here can be more-or-less directly related to the central question of "need," a common issue in all welfare legislation; a prima facie case of rationality can be made out on that basis. In the above three cases, no such relationship was found to exist by the lower courts.

3. In sum, we believe this case is unsuitable for plenary consideration of the statutory and constitutional issues sought to be presented. The narrow factual context in which the issues were presented and the meagerness of the record appear to have played a substantial part in the decision below, and led the court to refuse to accept the complaint as a class action. (J.S. App. 27 and n. 14, 44 n. 27; 281 F. Supp. at 861 and n. 14, 869 n. 27.) Appellants do not appear to challenge this last aspect of the court's decision. Particularly in this circumstance, a summary affirmance would not foreclose consideration of the broader issues lurking in this case in a fuller factual context.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court dismissing appellants' complaint should be affirmed.

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DECEMBER 1968.

APPENDIX

United States Code, Title 42:

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary.

(a) A State plan for aid and services to needy families with children must * * * (7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, as well as any expenses reasonably attributable to the earning of any such income; except that, in making such determination, the State agency may, subject to limitations prescribed by the Secretary, permit all or any portion of the earned or other income to be set aside for future identifiable needs of a dependent child; * * *.

(b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except * * *.

§ 603. Payment to States; computation of amounts.

* * * * *

(b) The method of computing and paying such amounts shall be as follows:

* * * * *

(2) The Secretary of Health, Education, and Welfare shall then certify to the Secretary of the Treasury the amount so estimated by the Secretary of Health, Education, and Welfare, * * *(B) reduced by a sum equivalent to the pro rata share to which the United States is equitably entitled, as determined by the Secre-

tary of Health, Education, and Welfare, of the net amount recovered during any prior quarter by the State or any political subdivision thereof with respect to aid to families with dependent children furnished under the State plan * * *.

§ 1352. State plans for aid to the permanently and totally disabled.

(a) A State plan for aid to the permanently and totally disabled must * * * (8) provide that the State agency shall, in determining need, take into consideration any other income and resources of an individual claiming aid to the permanently and totally disabled, as well as any expenses reasonably attributable to the earning of any such income * * *.

(b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except * * *.

§ 1353. Payments to States; computation of amounts.

* * * * *

(b) The method of computing and paying such amounts shall be as follows:

* * * * *

(2) The Secretary of Health, Education, and Welfare shall then certify to the Secretary of the Treasury the amount so estimated by the Secretary of Health, Education, and Welfare * * * (B) reduced by a sum equivalent to the pro rata share to which the United States is equitably entitled, as determined by the Secretary of Health, Education, and Welfare, of the net amount recovered during a prior quarter by the State or any political subdivision thereof with respect to aid to the permanently and totally disabled furnished under the State plan * * *.

Need-Requirements for State Public Assistance Plans, 33 Fed. Reg. 10230 (July 17, 1968):

* * * * *

3. *Requirements for state plans.* A State plan for OAA, AFDC, AB, APTD, or AABD must, as specified below:

A. *General.* Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis and all types of income will be taken into consideration in the same way, except where specifically authorized by Federal statute.

B. Standards of assistance. 1. Specify a Statewide standards, expressed in money amounts, to be used in determining (i) the need of applicants and recipients and (ii) the amount of the assistance payment.

* * * * *

3. Provide that the standard will be uniformly applied throughout the State.

* * * * *

C. Income and resources—OAA, AFDC, AB, APTD, AABD. 1. Specify the amount and types of real and personal property, including liquid assets, that may be reserved, i.e., retained to meet current and future needs while assistance is received on a continuing basis. In addition to the home, personal effects, automobile and income producing property allowed by the agency, the amount of real and personal property, including liquid assets, that can be reserved for each individual recipient shall not be in excess of $2,000. Policies may allow reasonable proportions of income from businesses or farms to be used to increase capital assets, so that income may be increased.

2. Provide that, in establishing financial eligibility and the amount of the assistance payment:

(i) All income and resources, after policies governing the allowable reserve, disregard or setting aside of income and resources have been applied, will be considered in relation to the State's standard of assistance, and will first be applied to maintenance costs;

(ii) Income and resources will be reasonably evaluated;

(iii) Only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered; * * *.

U.S. GOVERNMENT PRINTING OFFICE: 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 191

GERALDINE SNELL, *et al.*,

Appellants,

—v.—

GEORGE K. WYMAN, as Commissioner, New York State Department of Social Services; MITCHELL GINSBERG, as Commissioner of New York City Department of Social Services,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' MEMORANDUM IN REPLY TO SOLICITOR GENERAL'S BRIEF

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APPELLANTS' MEMORANDUM IN REPLY TO SOLICITOR GENERAL'S BRIEF

This memorandum is submitted on behalf of Appellants by permission of the Clerk of the Court in reply to the amicus curiae brief submitted by the Solicitor General on behalf of the United States.

The Issues Presented on Appeal

References in the Solicitor General's brief to the "small record" (p. 4) and the alleged failure of the appellants to present and develop certain issues before the court below

(pp. 8, 11, 12) constitute a gratuitous assertion by the government of what the issues should be and, by implication, an incorrect statement of the issues actually presented to this Court.

We are satisfied with the original presentation of these issues in our Jurisdictional Statement and will not repeat them here. Though we disagree with certain of Judge Frankel's characterizations of the appellants' case—the tone of which, incidentally, appears exaggerated in the light of Judge Kaufman's forceful dissent—we do not quarrel with the exposition in the majority and dissenting opinions of the facts and plaintiffs' arguments in the court below, with this possible exception:

The majority opinion in the Southern District states broadly "it is provided by regulation, and unequivocally represented to this court, that no such recovery may be sought from wages or salaries or from property acquired with such earnings" (J. S. App. 25; 281 F. Supp. at 860).

The dissenting opinion, though it holds that the burden of raising the earned income issue (presumably at the time of initial assignment of property) should not be placed on recipients, seems to assume, incorrectly, that the earned income exemption applies to these assets owned at the time of initial application as well as to after-acquired property (J. S. App. 49; 281 F. Supp. at 871). There has been no dispute, however, between the parties, and the regulation itself confirms, that the "employment income" exemption applies only to "resources acquired subsequent to a period of public assistance" (Exhibit attached). *Policies Governing the Administration of Public Assistance,* City of New York, Department of Social Services (reissued May, 1967), Sec. 189.

Consequently, whether or not the New York City Department violated its own rule in respect to Helen Marley's insurance premiums (J. S. App. 25; 281 F. Supp. at 860, n. 12, 872) is a matter for administrative determination and is not properly before this Court. What appellants *do* contend, however, *inter alia,* is that the uncontroverted and unqualified refusal of New York to grant an exemption, at the time of assignment, to that portion of assets attributable to earned income, does conflict with the rehabilitation policies of the Social Security Act.

We do not concur in Judge Frankel's refusal to regard this as a class suit which has the possible effect of unduly narrowing the scope of the issues presented. But even if we are wrong on this score it is absurd to suppose that appellants Geraldine Snell and Helen Marley, both of whom the record shows were employed shortly before the time of assignment of their respective assets, did not purchase the cooperative apartment (Snell) or life policy (Marley) at least in part with employment income.

The Legislative History

We also disagree with the government's arguments that derive from the legislative history of the federal recovery provisions. 42 U. S. C. 602(b)(2)(B), 1353(b)(2)(B). It is true (S. G. br. 6) that the 1939 Amendments added "mistakes" to "fraud" situations justifying recoveries but, clearly, Congress still intended to restrict recoveries to instances when, because of client cheating or mistake, the assistance payment violated the basic statutory purpose of aiding only the needy.

There is also no evidence in the legislative history that at the time of enacting the more lenient provisions of Medi-

cal Assistance to the Aged (1960) or Medicaid (1965), Congress debated whether to insert similar prohibitions against recoveries in the cash assistance titles. These statutes also were enacted after the "new emphasis on rehabilitative services began with the Kennedy Administration," an event relied upon heavily by this Court in *King* v. *Smith,* 392 U. S. 309, 325, n. 22. But even if we assume that Congress deliberately chose to exclude cash assistance recipients from the non-payment exemption, it does not necessarily follow, in the light of the "AFDC freeze" and other punitive provisions of the 1967 amendments, that Congress did so on reasonable and equitable grounds.

On the other hand, appellants have argued (J. S. 8) and the Solicitor General has not denied, that portions of the 1935 legislature history, when read together with related passages in the Old Age, Survivors' and Disability Insurance title, strongly indicate that in 1935 Congress intended to restrict recoveries to fraud situations. See, also, *City of Worcester* v. *Quinn,* 304 Mass. 276 (1939).

It also comes with poor grace for the Department of Health, Education and Welfare (HEW), to argue, through the Solicitor General (S. G. br. 7) that the validity of the New York and similar recovery provisions should be inferred from the fact that HEW had never disapproved the recovery provisions; Alabama's substitute father regulation, struck down by this Court as being in conflict with the Social Security Act, was neither approved nor disapproved by the federal agency. *King* v. *Smith,* 392 U. S. 309, 317, n. 11; see also, *Anderson* v. *Schaeffer,* —— F. Supp. —— (M. D. Georgia 1967) which involved a partially successful attack by *recipients* against Georgia's "employable mother" regulations.

The Statutory Conflict

The Solicitor General contends that the alleged conflict with the purposes of the Social Security Act is "inadequately developed on this record" (S. G. br. 8). This would be so if the government's brief expressed and attempted to meet all of appellants' contentions on this score. Instead the government greatly understates the appellants' case.

The government makes no reference to our principal contention that the recovery provisions frustrate the "self-support" and related purposes of the Social Security Act, 42 U. S. C. 601, 1351. Appellants do more than argue that the recovery provisions deter applicants or persuade recipients to leave the rolls (S. G. br. 9). Through expert witnesses we have also showed that the state, by insisting on repayment not only from those *able* to pay but from all those with property *available* for repayment (R. 674), vitiates the rehabilitation objectives of the federal statute by requiring destitution as a condition of assistance, by depressing the ambitions of those on the rolls, by discouraging low-income males from entering into marriage with AFDC mothers, and by facilitating the return to the relief rolls of former recipients who acquire assets (R. 631-2).

The government too narrowly interprets *King* v. *Smith* (S. G. br. 12) to mean that the Supremacy Clause argument must be based on a contravention of a specific federal standard contained in 42 U. S. C. 602, 1352. Nowhere in the majority opinion does the Court indicate that the validity of a state regulation has no relevance under the Supremacy Clause to the humane purposes of the Social Security Act recited in 42 U. S. C. 601, 1351.

This Court in *King* interpreted the term "parent" in 42 U. S. C. 606(a) to include only those persons with a legal duty to support, in order to meet "Alabama's second justification for its substitute father regulation" (at 327). Earlier in the majority opinion the Court said it was holding the regulation invalid "as inconsistent with *Subchapter IV* of the Social Security Act . . ." (at 312, n. 3) (emph. supplied) ". . . the regulation itself is unrelated to need" (at 320) ". . . insofar as this or any similar regulation is based on the State's asserted interests in discouraging illicit sexual behavior and illegitimacy it plainly conflicts with federal law and policy" (at 320).

In the instant case, Commissioner Ginsberg testified that the recovery provisions bear no relation to social work considerations but are designed to reimburse the public for the cost of assistance rendered (R. 500-501). This consideration, appellants contend, while otherwise valid, is unrelated to and conflicts with the rehabilitation purposes contained in 42 U. S. C. 601, 1351. The rehabilitation emphasis of the current statute, heavily relied upon by this Court in *King* (at 325, n. 22) also finds explicit expression in 42 U. S. C. 602(a)(12)(13) and 1352(a)(12) which mandate, respectively, service programs promoting child welfare, including a strengthened family life, and self-support or self-care for disabled recipients.

New York, as Judge Kaufman held (281 F. Supp. at 869), could feasibly devise a recovery scheme that would be compatible with the statutory purposes. Instead, New York requires the assignment even of minimal assets (R. 481). Disregarding the humane child welfare exception contained in 42 U. S. C. 602(7) relating to the "future identifiable needs of a dependent child" New York seeks repayment

even from estates otherwise payable to surviving minor children (R. 482-3, 592). The regulations do not permit administrators to "take into consideration the possibility that the recipient after exhausting his or her welfare allowance may return to the welfare rolls" (Ginsberg, R. 501; see also Wyman, R. 452). Contrary to the Solicitor General's assertion (S. G. br. 11) the record *does* show that New York, unlike California, does not permit homes to be designated as part of an allowable reserve (R. 23-25).

Most important, perhaps, whereas in *King* v. *Smith* needy Alabama children were denied assistance because of the immorality of their mothers, in New York likewise needy children will be denied categorical assistance if their mother refuses to assign to the department her property including resources the monetary value of which is not actually available to the family (Felder, R. 481; Ginsberg, R. 532; 18 N. Y. C. R. R. §§368.2, 369.2.

This unqualified requirement that all resources, tangible or not, be assigned as a prerequisite to assistance not only conflicts with the express rehabilitation purposes of the statute but also with HEW regulations prohibiting considerations, in determining need, of resources not actually available. *Need Requirements for State Assistance Plans*, 33 Fed. Reg. 10230 ff., Par. 3(C)(2)(iii).

Finally, the state recovery provisions that New York and HEW are now defending result in reimbursements to the state and federal government (J. S. App. n. 16; 281 F. S. n. 16; S. G. br. 7) that are grossly disproportionate to total outlays; the recovery provisions admittedly also have no effect on New York welfare benefits levels (Ginsberg, R. 500; Wyman, R. 449).

CONCLUSION

For the reasons stated above, the government's brief does not refute appellants' contention that a substantial question under the Constitution is presented in this case, and jurisdiction should be noted.

Respectfully submitted,

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December, 1968

Exhibit Attached to Appellants' Memorandum

POLICIES
GOVERNING THE ADMINISTRATION
OF
PUBLIC ASSISTANCE

[N. Y. City Emblem]

THE CITY OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

MITCHELL I. GINSBERG
Commissioner

Reissued May, 1967

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a. *Insurance.* Insurance holdings may be retained with a cash value (as distinguished from face value) up to $250 for each adult and up to $100 for each child in the family group. Insurance holdings are not required to be converted from the endowment, 20-payment life or any other plan, to the whole-life plan. The total cash value of policies of all members of a family shall not exceed $500. When the cash value in insurance policies for all members of the family exceeds $500, such policies shall be adjusted to a total cash value of $500. The proceeds of the adjustments are applied to meet immediate needs which may include the payment of advance premiums

(see Section 180). Waiving of insurance adjustments requires special approval. Assignment of insurance is not required in short-term cases.

b. *Real Property Used as a Home.* A bond and mortgage is not required on real property classified and occupied as a "home". When principal payments are granted as part of the carrying charges, a bond and mortgage shall be required to protect the Department to the extent of principal payments made.

Section 189. Recovery of Assistance

a. *Resources Acquired Subsequent to a Period of Public Assistance.* The Department may bring action against a person discovered to have real or personal property, or against the estate or executors, administrators or successors in interest of a person who dies leaving real or personal property, if such person or anyone for whose support he is or was liable received assistance and care during the preceding ten years.

The Department is entitled to recover the cost of such assistance or care up to the value of such property.

However, when these assets do not exceed an amount of money required to meet the family's budget needs for one year (two years if the money was obtained as damages for personal injuries), recovery action shall be initiated only if special approval is received.

No referral shall be made if the newly acquired assets consist solely of income from employment.

b. *Resources Concealed During a Period of Public Assistance.* Both civil and criminal action may be taken against a person who concealed resources while accepting public assistance. Concealed resources include any item of real or personal property, income in cash or kind from any source, unacknowledged while receiving public assistance. All cases in which there is evidence of concealment of resources, whether active, pending, or closed, shall be referred immediately to the Bureau of Resources and Legal Services and shall be subject to recovery action when there is evidence that:

1. Income in cash or kind from any source has been misrepresented or concealed.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

SNELL ET AL. *v.* WYMAN, COMM'R, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 191. Decided January 13, 1969.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.